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# OF MARKETS AND MEDIA: THE FIRST AMENDMENT, THE NEW MASS MEDIA, AND THE POLITICAL COMPONENTS OF CULTURE

ASHUTOSH BHAGWAT\*

*Over the past forty-five years, the role of cable television in the United States has undergone dramatic changes. Originally built to enhance broadcast television, cable television has become an independent source of television programming. As a result, it is now in direct competition with over-the-air broadcasters. In 1992, Congress overrode a presidential veto to enact the Cable Television Consumer Protection and Competition Act of 1992, which, among other things, subjects the cable industry to rate regulation by the Federal Communications Commission and requires cable operators to carry the signals of a specific number of local broadcast television stations. Soon after the Act became law, cable television system operators and programmers brought an action challenging the latter provisions, known as the must-carry provisions, in Turner Broadcasting Systems, Inc. v. Federal Communications Commission.*

*In this Article, Professor Bhagwat examines the Supreme Court's application of current First Amendment doctrine to government regulation of mass media. He briefly summarizes the current regulatory and economic structure of the cable industry. Next, starting from the Supreme Court's decision in Turner, he finds that the Court's traditional First Amendment analysis generates confusion when applied to mass media regulation because of inconsistencies existing in the Court's theoretical framework. Professor Bhagwat seeks to define an alternative theoretical groundwork. He argues that the First Amendment should be viewed instrumentally, and that wide access to ideas and diversity of speech are constitutionally favored results. He further argues that many modern reform proposals are constitutionally suspect because they define political speech too narrowly, and*

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*therefore incorporate political biases. Based on these conclusions, Professor Bhagwat proposes an alternative First Amendment analysis governing mass media regulation that replaces the current two-tier analysis with a unitary test. He concludes by considering the implications of his new approach for particular mass media regulation.*

## INTRODUCTION

This Article describes the inadequacy of the Supreme Court's current First Amendment doctrine when applied to government regulation of the mass media and seeks to develop a better, more tailored constitutional standard, with a particular focus on constitutional limits on regulation of the cable television industry. As a convenient starting point, the Article uses the Supreme Court's recent decision in *Turner Broadcasting System, Inc. v. Federal Communications Commission*.<sup>1</sup> The first part of this Article briefly summarizes the current regulatory and economic structure of the cable industry and then demonstrates that the well-settled analysis employed by both the majority and the dissent in *Turner* reveals deep inconsistencies in the Court's current First Amendment doctrine.<sup>2</sup> In particular, this Article demonstrates that both tiers of the two-tiered analysis currently used by the Supreme Court in reviewing First Amendment issues descend into incoherence when applied to cable television regulation, as well as when applied to other mass media regulation. First, the Court's current, broad definition of what constitutes "content-based" regulation is flawed because it fails to recognize that most mass media regulation necessarily takes into account, to some degree, the content of the regulated speech. The consequence of this flaw is a formalistic, and largely sterile, debate over what constitutes "content." Contrary to the Court's current doctrine, this Article argues that the relevant inquiry is not whether content matters, but how it should matter. Second, the *Ward/O'Brien* balancing test,<sup>3</sup> which has come to dominate the Court's review of

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1. 114 S. Ct. 2445 (1994).

2. In *Turner*, the Court appeared to uphold conditionally the constitutionality of the so-called "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 §§ 4, 5, 47 U.S.C. §§ 534, 535 (Supp. V 1993) [hereinafter 1992 Cable Act], which requires cable operators to carry the signals of local broadcast stations. *Turner Broadcasting*, 114 S. Ct. at 2460-70.

3. "*Ward/O'Brien* balancing" is the Supreme Court's current "intermediate scrutiny" test in the First Amendment area. For a detailed discussion of the test, see *infra* notes 119-32 and accompanying text.

content-neutral regulation, is essentially unworkable in the mass media context because it does not direct the analysis, or cabin the discretion, of a reviewing court. Finally, Part I of the Article concludes that the difficulties with the Court's current doctrine can be traced to an inconsistency in the Court's theoretical framework, which wrongly presumes a world of atomistic speakers and fungible speech. Contrary to this framework, especially in the mass media context, speakers are not numerous, and all speech is most certainly not equal.

Following Part I's description of the problems inherent in the Court's current jurisprudence, Part II of this Article seeks to define an alternative analysis. Part II first sets forth a theoretical groundwork. The key preliminary question is whether the First Amendment should be viewed instrumentally—as a means to achieve a better-functioning democracy—or as a tool for individual self-fulfillment. This Article posits that the instrumental view is clearly the better one. At least two significant conclusions follow from this premise: First, that the primary danger at which the Constitution is directed is governmental action; second, that wide access to ideas and diversity of speech are constitutionally favored results. Where the Article departs from previous commentary is in arguing that rather than defining diversity in a narrow sense, as encompassing only different ideological perspectives within a narrowly defined "political" sphere, diversity should be understood to require that all social values and choices should be open to debate. Any expressed vision of the just or desirable society should be accepted as protected speech on a constitutional par with explicitly political speech. Indeed, the Article demonstrates that the current theoretical attempts to distinguish the political from other elements of the common culture are quixotic, and themselves politically biased towards the mainstream.

Based on these arguments, this Article concludes, contrary to recent commentary, that the historical preference in First Amendment law for a free marketplace in ideas should be retained. Markets remain the best means currently available to permit the dissemination of goods, or ideas, freely and without governmental interference. Other approaches to speech markets, which emphasize the role of the government in controlling markets and media, risk disaster.

This is not to say that all regulation should be foreclosed. This Article contends that, especially in the context of the mass media, regulation to cure existing market dysfunctions is both desirable and constitutionally permissible. Indeed, the First Amendment introduces independent values into the marketplace that will sometimes call for regulation even when standard economic theory might not. These

values include a preference for diversity, even at the expense of efficiency, as well as a very strong disapproval of continuing governmental supervision.

Based on these considerations, this Article suggests that there is a need to revise the Court's First Amendment doctrine governing mass media regulation. The current two-tier analysis should be replaced with a unitary test that prohibits any regulatory preferences for particular types of speech, or for speakers *qua* speakers. In addition, the test should restrict government regulatory efforts to curing real, existing market dysfunctions, through the use of structural measures. In other words, the government should be severely restricted in the *interests* it may assert to defend direct regulations of speech. Furthermore, in determining the appropriate measures, the courts must consider the burden that such regulation imposes on speech, and the availability of less burdensome alternatives. Finally, the courts have a primary oversight role in this area that cannot be abandoned on the basis of deference to elected branches.

The consequences of such an approach for regulatory policy are complicated. With regards to cable, this Article contends that there should be a strong constitutional preference for structural measures such as common carrier regulation or access requirements, and an avoidance of preferential legislation such as the must-carry rules.

The Article concludes by considering the implications of this new approach for the regulation of other mass media, especially the print media and the emerging interactive technologies of the "Information Superhighway."

## I. *TURNER BROADCASTING* AND THE FAILURE OF TRADITIONAL FIRST AMENDMENT ANALYSIS

### A. *Background: The Structure and Regulation of Cable*

In examining the state of modern First Amendment analysis in the mass media context, the cable television<sup>4</sup> industry provides a logical starting point, both because of its growing dominance among

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4. Cable television generally refers to systems that deliver programming to the consumer through a wire, traditionally a coaxial cable, which enters the residence or business of the consumer and is connected directly to a television. *Turner Broadcasting*, 114 S. Ct. at 2451-52; Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329 332-34. This is in contrast to broadcast television, for example, which delivers programs through electromagnetic signals transmitted over the airwaves, and which therefore may be received by anyone with a television and antenna.

the various mass media, and because, in recent years, regulation of the cable industry has engendered extensive constitutional litigation, which has tested and exposed the limits of traditional First Amendment doctrine.<sup>5</sup> In the past fifteen years, cable television has developed into the primary source of video programming,<sup>6</sup> and consequently, the primary source of both news and entertainment for a majority of Americans. In Congressional hearings on the structure and operation of the cable television industry, Congress found that by 1992, 60% of households with television sets had subscribed to cable,<sup>7</sup> and by 1995 that figure had increased to 61.7%.<sup>8</sup> Congress also found that the vast majority of cable operators enjoyed monopoly positions in their service area.<sup>9</sup> In addition, by 1993, cable wires "passed" 95% of the homes in the country.<sup>10</sup> As a result, by the early 1990s, cable operators possessed a unique and largely un-

5. See, e.g., *Turner Broadcasting*, 114 S. Ct. at 2445; *Leathers v. Medlock*, 499 U.S. 439 (1991); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995) (en banc); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995); *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F.2d 954 (N.D. Cal. 1987); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Omega Satellite Prods. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982).

6. The term video programming, as used in this Article, includes information and entertainment provided over cable, broadcast television, VCR tapes, and a number of other delivery systems. See 47 U.S.C. § 522(19) (defining video programming as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station").

7. 1992 Cable Act § 2(a)(3), 47 U.S.C. § 521(a)(3).

8. *Growth Rate of Top 100 Basic Subs Almost Doubles: Part I*, 35 TELEVISION DIGEST, May 8, 1995, available in WESTLAW, TELDIG database, 1995 WL 2872948 [hereinafter TELEVISION DIGEST].

9. 1992 Cable Act § 2(a)(2), 47 U.S.C. § 521(a)(2). In many instances, this monopoly is protected by franchise requirements established by local authorities, but even in the absence of exclusive franchises, monopoly rather than competition is the rule. 1992 Cable Act § 2, 47 U.S.C. § 521. Evidence indicates that competition exists in fewer than one percent of the localities served by cable. *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 915 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995); *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 39-40 n.16 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994).

10. See *In re Telephone Company-Cable Television Cross-Ownership Rules*, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 F.C.C.R. 5781, 5848 & n.351 (1992) [hereinafter *Video Dialtone Order*]; Paula Bernia, *Multiple, User-Friendly Services Must Drive Info Highway*, TELEPHONY, Oct. 3, 1994, at 24.

constrained power to control the access to information of the majority of the American public.<sup>11</sup>

Despite the enormous growth of cable in recent years, cable television remains closely tied to the traditional broadcast television industry. In early years, cable operators<sup>12</sup> carried only broadcast signals; and even though, since the late 1970s and 1980s,<sup>13</sup> numerous independent cable programmers<sup>14</sup> have come into being, broadcast television stations, including in particular the major network affiliates, continue to constitute the core of most cable systems' offerings.<sup>15</sup> Nonetheless, in recent years cable operators have obtained increasing amounts of programming by paying for the signals of independent cable programmers, which today include the likes of Music Television (MTV), Home Box Office (HBO), the Discovery Channel, Cable News Network (CNN), C-SPAN, Nickelodeon, and countless others.<sup>16</sup> The industry is thus structured so that cable operators

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11. For a history of the development of the cable industry from the late 1940s to the present, see *Turner Broadcasting*, 114 S. Ct. at 2451; see also PATRICK PARSONS, *CABLE TELEVISION AND THE FIRST AMENDMENT* 12-24 (1987) (describing the history of First Amendment issues in cable regulation); Fred H. Cate, *The Future of Communications Policymaking*, 3 WM. & MARY BILL RTS. J. 1, 3-7 (1994) (summarizing history of FCC regulations of cable).

12. Cable operators are "those who own the physical cable network and transmit the cable signal to the viewer." *Turner Broadcasting*, 114 S. Ct. at 2452.

13. The first satellite cable network, Home Box Office (HBO), began service in 1975. See Brenner, *supra* note 4, at 329.

14. Cable programmers are "those who produce television programs and sell or license them to cable operators." *Turner Broadcasting*, 114 S. Ct. at 2452.

15. The legislative history of the 1992 Cable Act indicates that retransmitted local broadcast programming accounts for about two-thirds of total cable viewing hours. See S. REP. NO. 92, 102d Cong., 2d Sess. 35 (1992), reprinted in 1992 U.S.C.A.N. 1133, 1158; see also *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 64 (D.D.C. 1993) (Williams, J., dissenting) (describing the importance and popularity of retransmitted local broadcasts on cable systems), *vacated and remanded*, 114 S. Ct. 2445 (1994).

16. See Brenner, *supra* note 4, at 329; PARSONS, *supra* note 11, at 22-23; GEORGE SHAPIRO ET AL., *CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION* 2-3 (1983). Independent programmers who produce and distribute video programming for public consumption, but who do not own or control the broadcast or cable systems necessary to deliver their programming to the public, obtain a part of their revenues from payments by cable operators and a part from advertisers who purchase commercial time. In addition, the programmers leave open some advertising slots on these stations to be filled in with local advertising by the local cable operators. Apparently, however, the volume of local advertising revenue that cable operators obtain is relatively trivial. According to the undisputed evidence presented by one of the *Turner* litigants, the ratio of revenue obtained by cable operators from subscription fees to the revenue obtained from advertising is 25:1. Reply Memorandum of Time-Warner Entertainment in Support of Summ. Judg. at 15, *Turner Broadcasting v. FCC*, 819 F. Supp. 32 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994). For a description of the financing structure of cable programming, at least as of 1988, see Brenner, *supra* note 4, at 337.

typically pay programmers for their signal, rather than having programmers pay operators for carriage.<sup>17</sup>

The growth of independent cable programming has fundamentally altered the types of options available to viewers, because cable programmers tend to provide far more specialized, "niche" programming than do broadcasters.<sup>18</sup> This development is a predictable consequence of the much greater capacity of most cable systems than the airwaves. It is well known that broadcasters typically have an incentive to carry programming that will appeal to the majority of viewers, while ignoring minority tastes which fall below a relatively high threshold in terms of number of viewers.<sup>19</sup> One predicted consequence of this phenomenon is that broadcasters may limit viewpoints disfavored or deemed controversial by any significant portion of the population.<sup>20</sup> Cable operators, by contrast, are single entities who control multiple channels. In addition, the number of available channels on a cable system is greater than those available over the airwaves.<sup>21</sup> As a consequence, the most effective means for

17. BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 218-20 (1992). Either structure is conceivable, but because of the efficiency of bundling channels together, and because of the greater ease with which operators are able to bill customers, the industry has developed the former structure. *Id.* The payment structure may also be related to the relatively high risk associated with new programming ventures and the need for early income to permit programmers to develop programming *before* they have a large enough audience base to attract significant advertising revenues. This phenomenon may also explain why new cable programmers tend to seek financial backing from operators: they must ensure a minimum viewer base. See Brenner, *supra* note 4, at 337-38 n.37.

18. PARSONS, *supra* note 11, at 22; SHAPIRO ET AL., *supra* note 16, at 4.

19. This is due to of the limited number of television broadcast stations in any one market and also to the fact that an individual broadcaster controls only one channel in a given area. An example will demonstrate this point. Suppose a particular city, with a population of 100,000, has three television stations. Suppose, also, that 60% of the population prefer to watch sit-coms, 15% prefer soap operas, 15% prefer news programs, and 10% prefer nature shows. At any given time, *all three* stations will prefer to carry a sit-com because each will have an expected audience share of 20%, assuming that all provide programming of similar quality. Any other choice will lead to a lower share. This example, of course, somewhat oversimplifies the true situation, but the basic point holds.

20. See Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1082 n.115 (1994) [hereinafter *The Message in the Medium*].

21. *Turner Broadcasting*, 114 S. Ct. at 2452 ("More than half of the cable systems in operation today have a capacity to carry between 30 and 53 channels.") (citing 1994 TELEVISION AND CABLE FACTBOOK I-69). "[A]bout 40 percent of cable subscribers are served by systems with a capacity of more than 53 channels." *Id.*; see also Jeff Peline, *Pac Tel Expected to Get Cable OK This Week*, S.F. CHRON., July 19, 1995, at C1 ("[C]able companies . . . typically [provide] 60 channels of programming."). Broadcast stations in a locality typically number in the single digits. There is also sufficient programming available to fill the capacity of most cable systems. In 1992, 78 national cable networks



cable operators to maximize the number of their subscribers, and therefore their revenue,<sup>22</sup> is to provide a varied programming package that will appeal to both majority and minority tastes. Thus, even if a particular station will appeal to only a relatively small minority of viewers, the cable operator may well carry it in order to attract those viewers as subscribers, while using other channels to attract other segments of the potential audience base.<sup>23</sup>

Another important development in the cable industry in recent years has been a substantial amount of horizontal and vertical integration.<sup>24</sup> In particular, cable operator chains, known as multiple system operators (MSOs),<sup>25</sup> have been purchasing local cable systems, at such a rate that, by 1995, the five largest MSOs together served over fifty percent of the nation's cable subscribers, thus creating an extraordinary level of horizontal integration.<sup>26</sup> At the same time, most major cable programming networks today are owned

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were in operation, a substantially higher number than the channel capacity of most cable operators. *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 915 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995); *see also In re Implementation of Sections Twelve and Nineteen of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 F.C.C.R. 3359, 3361 (1993) [hereinafter *Development of Competition and Diversity in Video Programming Distribution and Carriage*] (citing legislative findings prior to 1992 of 68 national cable networks). By 1994 that number had risen to 106 national networks. *See Implementation of Section Nineteen of the Cable Television Consumer Protection and Competition Act of 1992, First Report*, 9 F.C.C.R. 7442, ¶ 161 n.434 (1994).

22. Because of the very high fixed costs and relatively low marginal costs associated with the provision of cable service, cable operators can attempt to maximize revenue by offering incentives to sign up as many subscribers as possible. In other words, it is almost always in the financial interest of a cable operator to make an additional sale.

23. For a discussion of this phenomenon, see Andrew A. Bernstein, Note, *Access to Cable, Natural Monopoly, and the First Amendment*, 86 COLUM. L. REV. 1663, 1686-87 (1986).

24. In the context of the cable industry, horizontal integration refers to ownership of multiple cable systems by a single firm, and vertical integration refers to common ownership of cable systems and cable programmers by a single firm. *See* 1992 Cable Act § 2(a)(5), 47 U.S.C. § 521(a)(5); 2 CABLE TELEVISION LAW: BEYOND THE CABLE ACT 59-61 (Frank Lloyd ed., 1994); OWEN & WILDMAN, *supra* note 17, at 8.

25. An MSO is a firm which owns multiple cable systems in different jurisdictions. For the last several years, the two largest MSOs in the country have been Tele-Communications, Inc. (TCI) and Time Warner. *See Chesapeake and Potomac Tel. Co.*, 830 F. Supp. at 915; TELEVISION DIGEST, *supra* note 8.

26. TELEVISION DIGEST, *supra* note 8. Indeed, the largest MSO, TCI, alone serves almost 25% of the nation's subscribers. *See* Tony Jackson, *Viacom Clincher \$2 Billion Sale of Cable TV Unit*, FIN. TIMES, July 26, 1995, at 23. For Congress' findings on horizontal integration, see S. REP. NO. 92, 102d Cong., 2d. Sess 32, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1165.

at least in part by MSOs.<sup>27</sup> Some commentators have argued that this practice of vertical integration is efficient because it has ensured mutual access to subscribers and programming.<sup>28</sup> Others have suggested that cable operators have integrated into programming in order to create barriers to entry for competing cable operations or other transmission services that might represent competition for established operators.<sup>29</sup> In other words, it is possible that the substantial vertical integration of the cable industry, in combination with the horizontal integration, may permit MSOs to foreclose competition in the transmission business by creating entry barriers through control of programming.<sup>30</sup> A major consequence of this vertical integration has been claims by broadcasters that cable operators favor affiliated programmers in selecting which signals to carry and in assigning channel locations, at the expense of smaller broadcast stations.<sup>31</sup> Because of the monopoly that most cable operators enjoy, and because of increasing horizontal integration within the industry, some have viewed this alleged discrimination as a serious threat to independent broadcasters and programmers, providing the major impetus for the must-carry provisions of the

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27. OWEN & WILDMAN, *supra* note 17, at 245; *see also* 1992 Cable Act §2(a)(5), 47 U.S.C. § 521(a)(5); S. REP. NO. 92, 102d Cong., 2d Sess. 25 (1992) (describing ownership of major cable networks), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158; David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 Fed. Comm. L.J. 511, 515-17 (1995) (summarizing current state of vertical integration).

28. OWEN & WILDMAN, *supra* note 17, at 245.

29. *See, e.g.*, Bruce A. Olcott, Note, *Will They Take Away My Video-Phone if I Get Lousy Ratings?: A Proposal for a "Video Common Carrier" Statute in Post-Merger Telecommunications*, 94 COLUM. L. REV. 1558, 1583-88 (1994); Waterman, *supra* note 27, at 517-23 (summarizing economic theory and empirical evidence supporting foreclosure theory). Indeed, it has been claimed that cable operators have obtained control over programmers by exacting ownership interests as the price for carriage of the programmer's channel. *See, e.g.*, 1992 Cable Act § 12, 47 U.S.C. § 536(a)(1) (instructing FCC to prohibit such conduct).

30. For example, if the ability to provide HBO or CNN is essential to the success of a cable operator's potential competitor (whether it is another cable operator or an alternative technology provider such as satellite-based systems), then if the local operator owns that essential programmer, the local operator may be able to prevent effective competition from developing by denying access to the necessary programming. An essential assumption of any such theory, however, is that no substitutes are available for some particular programming, or that there are substantial entry barriers in the video programming market. *See* OWEN & WILDMAN, *supra* note 17, at 220. However, the large number of national cable networks that exist today challenges these assumptions. *Id.*

31. *See* Brief for Appellee at 23-24 & nn. 10-13, *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994); *id.* at 40 n.26 (citing evidence of cable systems dropping broadcasters in favor of programmers in which the cable system had an equity stake); Waterman, *supra* note 27, at 512 & n.3, 524 (citing evidence of complaints).

Cable Television Consumer Protection and Competition Act of 1992.<sup>32</sup>

On the regulatory side, the dominant factor for the cable industry has been the almost universal existence of municipal franchise requirements and the imposition of conditions as the price of a franchise.<sup>33</sup> These franchises, which have often been exclusive, have been justified by reference to the "natural monopoly" structure of cable,<sup>34</sup> though there is some dispute over whether the monopoly status which characterizes most cable operations is a consequence of the very economic structure of the industry, or whether it is merely a product of regulation.<sup>35</sup>

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32. See 1992 Cable Act §§ 2(a)(4)-(5), 47 U.S.C. § 521(a)(4)-(5); see also *Turner Broadcasting*, 114 S. Ct. at 2454-55 (discussing the effects that horizontal integration in the industry has had on the viability of local broadcasters).

33. SHAPIRO ET AL., *supra* note 16, at 13-14; Brenner, *supra* note 4, at 344-50. The most important of these are the congressionally authorized, and widely adopted, requirements that operators set aside channel space for Public, Education, and Government access (PEG), see 1992 Cable Act § 10(c), 47 U.S.C. § 531, which have themselves engendered numerous First Amendment challenges, *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). See also Donald W. Hawthorne & Monroe E. Price, *Rewiring the First Amendment: Meaning, Content and Public Broadcasting*, 12 CARDOZO ARTS & ENT. L.J. 499, 508-10 & n.48 (1994) (describing cases in which PEG requirements engendered First Amendment challenges). Another standard condition mandated by the Cable Communications Policy Act of 1984 is that all areas of a jurisdiction, including lower-income areas, be served by the operator. Cable Communications Policy Act of 1984 § 2, 47 U.S.C. § 541 (1988 & Supp. 1993) [hereinafter 1984 Cable Act]. The 1984 Cable Act prohibits franchising authorities from requiring particular programming as a condition of a franchise. *Id.* § 2, 47 U.S.C. § 544. Franchisors are, however, permitted to impose requirements "for broad categories of video programming or other services." *Id.* § 2, 47 U.S.C. § 544.

34. For a fascinating discussion of the economic theory underlying franchising and regulation of "natural monopoly" utilities, see Oliver Williamson, *Franchise Bidding for Natural Monopolies—In General and With Respect to CATV*, 7 BELL J. ECON. 73 (1976). The constitutionality of exclusive franchising occasionally has been challenged. See *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). For an enlightening discussion in such a case by Judge Posner of the theory of natural monopoly and its relation to exclusive franchising, see *Omega Satellite Prod. v. City of Indianapolis*, 694 F.2d 119, 126 (7th Cir. 1982).

35. Compare *Omega Satellite Prod.*, 694 F.2d at 126 (finding cable to be a natural monopoly) and Daniel Brenner, *Cable Franchising and the First Amendment*, 10 HASTINGS COMM. & ENT. L.J. 999, 1013-19 (1988) (same) with Thomas Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335, 1346-75 (1986) (questioning whether cable satisfies the requirements of natural monopoly theory and arguing that even if it does, the granting of exclusive franchises may still not be sound policy). For a technical discussion of the theory of natural monopoly, subadditivity of costs, and contestable markets, see WILLIAM BAUMOL ET AL., *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE* (1982).

At the federal level, regulation of cable has come primarily from the Federal Communications Commission (FCC) and has been grounded from the beginning on the FCC's expressed concern that the growth of the cable industry might threaten the broadcast industry and the benefits of "free television." Beginning in 1962, the FCC started to require some cable operators to carry, upon request, the signals of local broadcasters operating in the region where the cable operator was providing service,<sup>36</sup> and in 1966 the FCC extended these original "must-carry" requirements to most of the cable industry.<sup>37</sup> These rules remained at the center of the FCC's regulation of cable until 1985, when the United States Court of Appeals for the D.C. Circuit struck them down as violating the First Amendment rights of cable operators.<sup>38</sup>

Congress took its first major step towards regulating the cable industry with the Cable Communications Policy Act of 1984.<sup>39</sup> Among other things, the 1984 Act prohibited most rate regulation of cable services<sup>40</sup> and, in a provision with important long-term policy implications, stated that cable systems would not be regulated as common carriers.<sup>41</sup> In other words, the Act guaranteed that cable operators would retain their right to select the programming that would be carried over their systems. However, to ensure commercial programmers unaffiliated with the cable operator access to cable operators' audiences, Congress sought to create a system of leased access to channels for these commercial programmers.<sup>42</sup>

36. See *Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 464 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

37. CATV Second Report and Order, 2 F.C.C.2d 725, 745 (1966), *aff'd sub nom.* *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968). For a history of the FCC's must-carry regulations, see Elizabeth A. Cowles, Note, *Federal Communications Commission, Must-Carry and the Continuing Search for a First Amendment Standard of Review for Cable Regulation*, 57 GEO. WASH. L. REV. 1248, 1249-52 (1989); see also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 163-67 (1968) (reciting history of FCC regulation of cable).

38. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). A revised version of the rules was again struck down in *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988).

39. Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.). Many of the provisions of the 1984 Act were modified or repealed by the 1992 Cable Act.

40. *Id.* sec. 2, § 623, 98 Stat. at 2788 (codified as amended at 47 U.S.C. § 543).

41. *Id.* sec. 2, § 621, 98 Stat. at 2786 (current version at 47 U.S.C. § 541(c)).

42. For a summary of the 1984 Act's provisions, see Brenner, *supra* note 4, at 350-52. The common carrier and leased-access provisions, both of which survived the 1992 legislation, are codified at 47 U.S.C. § 541(c) and 47 U.S.C. § 532, respectively. The leased

In addition to these provisions, Congress also codified the FCC's so-called cable/telco cross-ownership prohibition, which prohibits telephone companies ("telcos") from providing cable service in their service area.<sup>43</sup> These cross-ownership rules, which the FCC first adopted in 1970,<sup>44</sup> were originally designed to protect the then-nascent cable industry from domination by telephone companies and to ensure that cable did not become an adjunct to the telcos' existing telephone monopolies.<sup>45</sup> In 1992, however, the FCC concluded that the cross-ownership prohibition was no longer necessary, given how well-established the cable industry had become, and therefore recommended that Congress repeal the prohibition.<sup>46</sup> Moreover, the cable/telco cross-ownership restriction has recently been the subject of a series of First Amendment challenges.<sup>47</sup> In these cases, every court that has considered the issue to date has struck down the cross-ownership bar as violative of the First Amendment rights of telephone

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access provisions have generally not been perceived to be very successful, at least in part because of the lack of clear guidelines for pricing leased access channels. See H.R. REP. NO. 628, 102d Cong., 2d Sess. 39-40 (1992).

43. 1984 Cable Act, Pub. L. No. 98-549 sec. 2, § 613, 98 Stat. 2779, 2785 (current version at 47 U.S.C. § 533(b)). Section 533(b) prohibits local telephone companies from providing "video programming directly to subscribers" in their service areas, or from supplying their facilities to affiliated entities who intend to use the facilities to provide video programming to subscribers. *Id.* Video programming, in turn, is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." *Id.* sec. 2, § 602, 98 Stat. at 2781 (current version at 47 U.S.C. § 522(16)). The FCC has interpreted this provision as static, so that the relevant comparison is to programming provided by broadcasters in 1984. Video Dialtone Order, *supra* note 10, 7 F.C.C.R. at 5820. At the time of this writing, both Houses of Congress were considering legislation to repeal the cross-ownership ban. See S. 652, 104th Cong., 1st Sess. § 202 (passed June 15, 1995); H.R. 1555, 104th Cong., 1st Sess. § 201 (1995). The fate of this legislation, however, remains uncertain.

44. 47 C.F.R. § 63.54 (1970); see Application of Tel. Cos. for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Sys., 21 F.C.C.2d 307 (1970), *modified*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971) [hereinafter Section 214 Certificates].

45. Section 214 Certificates, 21 F.C.C.2d at 323-26.

46. Video Dialtone Order, *supra* note 10, 7 F.C.C.R. at 5847-51. In this Order the FCC also authorized telcos to provide so-called Video Dialtone platforms, through which telcos would be able to sell video transmission capacity to unaffiliated programmers on a common carrier basis. *Id.* at 5789-99. During discussions concerning the 1992 Cable Act, Congress considered revocation of the cross-ownership bar, but ultimately elected not to do so. S. REP. NO. 92, 102d Cong., 2d Sess. 46-47, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1179-80.

47. See *infra* note 48. The impetus for the constitutional challenges to 47 U.S.C. § 533(b) appears to have been the release of the FCC's Video Dialtone Order in August of 1992. Video Dialtone Order, *supra* note 10, 7 F.C.C.R. at 5781. The Order permits telephone companies to begin providing video programming to subscribers on a common carrier basis, thereby providing competition to incumbent cable operators. *Id.* at 5859-60.

companies, holding that the law cannot survive intermediate scrutiny.<sup>48</sup> The issue is now pending in the Supreme Court.

With the 1992 Cable Act,<sup>49</sup> Congress revisited the area of cable regulation and changed its course almost 180 degrees, replacing what had become practically a laissez-faire system with a system of wide-ranging controls based upon the model of utility regulation. First and foremost, the 1992 Act imposed extensive rate regulation on the cable industry.<sup>50</sup> Additionally, and second only to rate regulation in importance, are the must-carry<sup>51</sup> and retransmission consent<sup>52</sup> provisions of the 1992 Cable Act. The more constitutionally problematic of these are the must-carry rules contained in sections four and five of the Act.<sup>53</sup>

To summarize briefly, section four sets forth the must-carry rules for commercial broadcasters. It requires cable operators to carry, upon request, the signals of local commercial television stations, up to a specified maximum.<sup>54</sup> The cable operator must carry the broad-

48. The leading challenge was filed by Bell Atlantic in Virginia in December of 1992. *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *cert. granted*, 115 S. Ct. 2608 (1995). At least one other appellate court and several district courts have also ruled that 47 U.S.C. § 533(b) is unconstitutional. *See* *US West v. United States*, 48 F.3d 1092, 1106 (9th Cir. 1994); *Southern New England Tel. Co. v. United States*, No. 3:94-CV-80 (DJS), 1995 U.S. Dist. LEXIS 7212, at \*24 (D. Conn. April 28, 1995); *Ameritech Corp. v. United States*, 867 F. Supp. 721, 737 (N.D. Ill. 1994); *BellSouth v. United States*, 868 F. Supp. 1335, 1344 (N.D. Ala. 1994); *US West v. United States*, 855 F. Supp. 1184, 1193 (W.D. Wash. 1994), *aff'd*, 48 F.3d 1092 (9th Cir. 1994). For a detailed discussion of the background and reasoning of the leading challenge to § 533(b), see Susan Ross, *A Decade After Divestiture: Regional Bells, Video Programming and the First Amendment*, 21 RUTGERS COMPUTER & TECH. L.J. 143 (1995).

49. 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. (Supp. V 1993)). The 1992 Cable Act represents the most significant effort by Congress to date to regulate the cable television industry. As of this writing the fate of many of the provisions of the 1992 Act, including notably rate regulation, remain in doubt. *See* S. 652, 104th Cong., 1st Sess. § 301 (passed June 15, 1995); H.R. 1555, 104th Cong., 1st Sess. § 201 (1995).

50. 1992 Cable Act, sec. 3, §623, 106 Stat. 1460, 1464 (codified as amended at 47 U.S.C. § 543). The FCC and local franchising authorities are together required to prescribe rates for a defined "basic service," and the FCC is further instructed to establish guidelines for what would constitute "unreasonable rates" for other services, all on the basis of costs and revenues, on the model of traditional utility regulation. *Id.* sec. 3, § 623, 106 Stat. 1460, 1464-71 (codified as amended at 47 U.S.C. § 543).

51. *Id.* sec. 4, 5, §§ 614, 615, 106 Stat. at 1471-81 (current version at 47 U.S.C. §§ 534, 535).

52. *Id.* sec. 6, § 325, 106 Stat. at 1482 (codified as amended at 47 U.S.C. § 325).

53. *Id.* sec. 4, 5, §§ 614, 615, 106 Stat. at 1471-81 (current version at 47 U.S.C. §§ 534, 535).

54. 1992 Cable Act, § 4, 47 U.S.C. § 534. If the number of channels allocated for a particular operator exceeds the number of local commercial stations, the cable operator

casters' signals in their entirety, and the cable operator is prohibited from seeking or accepting compensation for carriage of the signal.<sup>55</sup> Section five imposes similar carriage obligations for the signals of "qualified noncommercial educational television stations,"<sup>56</sup> except that the number of channels that must be allocated to carriage of such stations is more limited than the number required in the commercial setting.<sup>57</sup> If no local noncommercial station exists, however, operators must import and carry the signal of a distant noncommercial station.<sup>58</sup>

In addition to rate regulation, must-carry, and retransmission consent, Congress enacted a number of other, less intrusive measures in the 1992 Cable Act designed to correct perceived competitive problems in the cable industry. In particular, to prevent cable operators from using their market power in distribution to gain or use power in the programming market, in section twelve Congress directed the FCC to promulgate regulations governing carriage agreements between cable operators and programmers and prohibiting operators from discriminating against unaffiliated programmers.<sup>59</sup> In section nineteen, to protect competition in the distribution market, Congress directed the FCC to enact regulations prohibiting satellite programmers affiliated with a cable operator from discriminating against other distributors or from entering into exclusive contracts

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is also required to carry the signals of qualified low-power stations. § 4, 47 U.S.C. § 534(c). In determining whether a low power station is "qualified," the FCC may consider whether "the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations." § 4, 47 U.S.C. § 534(h)(2)(B).

55. § 4, 47 U.S.C. § 534(b)(10).

56. § 5, 47 U.S.C. § 535(1). These are essentially stations that are either licensed as such by the FCC and eligible for grants from the Corporation for Public Broadcasting or are owned by a municipality and transmit educational programming. *Id.*

57. § 5, 47 U.S.C. § 535(b)-(c). Systems with 12 or fewer channels must carry one such station, systems with 13 to 36 channels must carry between one and three such stations, while systems with greater than 36 channels must carry all local stations requesting carriage, except that they need not carry more than three stations if substantial duplication of programming would result. § 5, 47 U.S.C. § 535(b), (e).

58. § 5, 47 U.S.C. § 535(b)(3)(B). The flip side of the 1992 Cable Act's must-carry rules is the retransmission consent provisions, which prohibit cable operators from retransmitting commercial broadcast station signals without express authority of those stations. § 6, 47 U.S.C. § 325(b). This provision is obviously in tension with the must-carry rules, and so broadcast stations are required to elect between must-carry and retransmission consent rights, with the right to re-elect every three years. *Id.*

59. § 12, 47 U.S.C. § 536.

with their affiliated operator.<sup>60</sup> Finally, in section eleven, Congress directed the FCC to begin proceedings within one year that would address the perceived problems of integration in the cable industry.<sup>61</sup> The Act directs the FCC to consider limiting the size of cable operators and the number of channels an operator may dedicate to affiliated programmers, and to consider restricting the right of operators to engage in programming at all.<sup>62</sup>

### B. *The Turner Decision: Tiers, Tests, and Incoherence*

Soon after the passage of the 1992 Cable Act, a group of cable operators and programmers initiated the inevitable constitutional challenge to the must-carry provisions before a three-judge panel of the United States District Court for the District of Columbia.<sup>63</sup> After a divided court granted summary judgment to the government defendants,<sup>64</sup> the plaintiffs took a direct appeal to the Supreme Court.<sup>65</sup> This appeal produced the opinion in *Turner Broadcasting System, Inc. v. Federal Communications Commission*,<sup>66</sup> in which the Court for the first time seriously grappled with the First Amendment issues that federal and state government regulation of cable television raised. While the Court had touched upon the subject of the cable industry in previous cases,<sup>67</sup> and indeed had gone so far as to

60. § 19, 47 U.S.C. § 548; Development of Competition and Diversity in Video Programming Distribution and Carriage, *supra* note 21, at 3359 (FCC Order implementing congressional directive).

61. § 11, 47 U.S.C. § 533(f).

62. *Id.*; see also *In re Implementation of Sections Eleven and Thirteen of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits for Cable Television*, Second Report and Order, 8 F.C.C.R. 8565 (1993) [hereinafter *Horizontal and Vertical Ownership Limits*] (presenting FCC implementation of congressional directive).

63. *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 51 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994). In light of the D.C. Circuit's decisions in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), and *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517, *cert. denied*, 486 U.S. 1032 (1988), Congress was aware of the possible constitutional problems with the must-carry rules, and therefore provided for the convening of a three-judge court in the event of a constitutional challenge, with a right of direct appeal to the Supreme Court in the event the provisions were held unconstitutional. 1992 Cable Act § 23, 47 U.S.C. § 555(c).

64. *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 51 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994).

65. 114 S. Ct. 38 (1993).

66. 114 S. Ct. 2445 (1994).

67. See, e.g., *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968);



recognize that cable programming and operations involved speech entitled to First Amendment protection,<sup>68</sup> the Court had never had occasion to review the constitutionality of a particular regulatory regime. While the *Turner* Court did not definitively resolve the constitutionality of the must-carry provisions, choosing instead to remand for further factual findings, it set forth a framework to be applied on remand.<sup>69</sup> Thus, with *Turner*, the Court appears to have chosen general standards for First Amendment review of cable regulation.

The most noteworthy aspect of the *Turner* decision is that, even though it is the Court's first serious attempt to apply the First Amendment to a new and extremely important communications medium, the Court's analysis reveals no substantial doctrinal revisions or innovations. Both the majority and the dissent agreed that the case could and should be resolved under the Court's "settled" First Amendment doctrine.<sup>70</sup> That doctrine, in essence, consists of the now-familiar two-tier analysis, whereby regulations that are "content-based"<sup>71</sup> are subject to exacting, "strict" scrutiny and will be upheld only if necessary to achieve a compelling government interest, while regulations that are "content-neutral"<sup>72</sup> are tested only under the more forgiving *O'Brien* balancing test.<sup>73</sup> Indeed, the Justices displayed remarkable unanimity regarding the general doctrinal analysis to be used, even though the Court fragmented badly over the application of its First Amendment doctrine to the facts and over the proper result in the case.<sup>74</sup>

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cf. *Leathers v. Medlock*, 499 U.S. 439 (1991) (upholding tax on cable service).

68. See *Preferred Communications*, 476 U.S. at 494-95.

69. *Turner Broadcasting*, 114 S. Ct. at 2470-72.

70. *Id.* at 2457, 2458-59; *id.* at 2476-79 (O'Connor, J., concurring in part and dissenting in part).

71. The term "content-based" generally refers to regulations that distinguish between speech based on subject matter. For a discussion of the difficulties the Court has faced in defining this term, see *infra* Part I.B.1.

72. Content-neutral regulations are those that are not content-based. For a discussion of the *Ward/O'Brien* test, see *infra* notes 119-32 and accompanying text.

73. For a general description of the two-tier analysis, see, e.g., *Turner Broadcasting*, 114 S. Ct. at 2458-59; *id.* at 2477-80 (O'Connor, J., concurring in part and dissenting in part); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 112 (1991); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987).

74. Justice Kennedy announced the judgment of the Court and delivered an opinion, most of which garnered majority support, though the particular majority shifted through different parts of the opinion. *Turner Broadcasting*, 114 S. Ct. at 2451-70. However, the critical Section III-B of Justice Kennedy's opinion, which sets forth the issues to be considered on remand, secured only four votes. *Id.* at 2470-72. Justice Blackmun filed a

In particular, Justice Kennedy's majority opinion, after rejecting the government's argument that cable regulation should be subject to the lower level of scrutiny applied to the regulation of broadcast television,<sup>75</sup> affirmed the lower court's critical conclusion that the must-carry rules were content-neutral.<sup>76</sup> The Court then remanded with directions to take evidence to determine if the must-carry rules did in fact advance their stated purpose of preserving free television, and if so, whether the rules were narrowly tailored, that is, whether they burdened substantially no more speech than necessary, and whether there existed no "less restrictive means" to achieve Congress' ends.<sup>77</sup>

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concurring opinion, though he joined Justice Kennedy's opinion in full. *Id.* at 2472-73 (Blackmun, J., concurring). Justice Stevens filed an opinion concurring in part and in the judgment, in which he agreed with much of Justice Kennedy's doctrinal analysis but disagreed on the need for a remand, arguing instead that the must-carry rules were plainly constitutional and therefore that the judgment below should be affirmed. *Id.* at 2473-75 (Stevens, J., concurring in part and concurring in the judgment). Finally, Justices O'Connor and Ginsburg both filed opinions concurring in part and dissenting in part, arguing that the must-carry rules were plainly unconstitutional, and that therefore the judgment should be reversed. *Id.* at 2475-81 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2781 (Ginsburg, J., concurring in part and dissenting in part). Because no consistent majority supported any particular disposition of the case, Justice Stevens, as an "accommodation," voted to vacate and remand. *Id.* at 2475 (Stevens, J., concurring in part and concurring in the judgment). For a detailed description of the various opinions, see Marc Peritz, Comment, *Turner Broadcasting v. FCC: A First Amendment Challenge to Cable Television Must-Carry Rules*, 3 WM. & MARY BILL RTS. J. 715, 738-52 (1994).

75. *Turner Broadcasting*, 114 S. Ct. at 2456-58 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799 (1978); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)). The government argued by analogy that the economic structure and market dysfunctions of the cable industry justified the deferential standard of review that the Court had previously accorded to regulations of the broadcast industry. *Id.* at 2456. The Court rejected the analogy, holding that the broadcasting cases were based on spectrum "scarcity," a rationale that had no application to cable, with its potentially limitless channel capacity. *Id.* at 2457. The Court also rejected the argument that market imperfections alone could justify a lower level of First Amendment scrutiny, pointing out that the Court had already rejected such an argument in the context of the print media. *Id.* at 2457-58. Finally, in a critical paragraph, the Court stated that while "the unique physical characteristics of cable transmission should [not] be ignored when determining the constitutionality of regulations affecting cable speech . . . they do not require the alteration of settled principles of our First Amendment jurisprudence." *Id.* at 2457.

76. *Id.* at 2458-64.

77. *Id.* at 2470-72. Justice Blackmun filed a concurring opinion agreeing with all of Justice Kennedy's analysis, but suggesting that on remand the district court should defer heavily to Congress' policy judgments. *Id.* at 2472-73 (Blackmun, J., concurring). As noted, Justice Stevens did not join the portion of Justice Kennedy's opinion discussing the remand, so that this portion commanded only a plurality. See *supra* note 74.

Justice O'Connor's dissenting opinion,<sup>78</sup> in contrast, argued that the must-carry rules were content-based because they included an explicit preference "for diversity of viewpoints, for localism, for educational programming, and for news and public affairs," all of which, in the dissenters' view, were content-based justifications for regulation.<sup>79</sup> The dissent then quickly rejected an argument that the must-carry rules could survive strict scrutiny and concluded by arguing that the rules could not even survive intermediate scrutiny under the *O'Brien* test because they were not "narrowly tailored."<sup>80</sup> As this Article will now demonstrate, these differences in the Justices' opinions go to the very core of what constitutes a "content-based" regulation and what "narrow tailoring" entails.

### 1. Content, Diversity, and Product Markets

In the *Turner* case, Justice Kennedy's majority opinion, Justice O'Connor's dissenting opinion, and Justice Ginsburg's dissenting opinion each applied the well-established content-based/content-neutral dichotomy, and each agreed that if the challenged regulation were found to be content-based, it would be subject to "strict scrutiny."<sup>81</sup> Moreover, Justices Kennedy and O'Connor agreed that if the regulations were content-neutral, they would be subject to an intermediate level of scrutiny—the *ad hoc* balancing approach known

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78. *Id.* at 2475-81 (O'Connor, J., concurring in part and dissenting in part). The dissent was joined by Justices Scalia, Ginsburg, and Thomas (in part). Justice Ginsburg also filed a separate, short dissent endorsing the analysis of Judge Williams in dissent below. *Id.* at 2481 (Ginsburg, J., concurring in part and dissenting in part). For a more complete description of the opinions in *Turner*, and the history of the litigation, see Peritz, *supra* note 74, at 715.

79. *Turner Broadcasting*, 114 S. Ct. at 2477 (O'Connor, J., concurring in part and dissenting in part).

80. *Id.* at 2478-80 (O'Connor, J., concurring in part and dissenting in part).

81. *See id.* at 2458-69; *id.* at 2475-79 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2481 (Ginsburg, J., concurring in part and dissenting in part). Justice Stevens did not join a portion of Justice Kennedy's content analysis, nor did he join an earlier section in which Justice Kennedy rejected an argument in which the government sought a much lower standard of scrutiny for cable regulation by analogizing to the Court's cases dealing with broadcast regulation. *See id.* at 2473 (Stevens, J., concurring in part and concurring in the judgment); *supra* note 74. Thus it may be that Justice Stevens does not concur fully with application of the Court's two-tier analysis. However, if that is the case, it would appear that he would support an even less stringent or detailed approach, analogous to rational basis review. *See id.* at 2473 (Stevens, J., concurring in part and concurring in the judgment) (suggesting that "intrusive regulation" of cable may not be constitutionally problematic). Such an approach is even more susceptible to the objections set forth in this article. *See infra* Parts I.B.2 and II.A.3. In any event, at least eight of the nine Justices did not appear to question the traditional two-tier framework at all.

as the *O'Brien* test.<sup>82</sup> Thus, the necessary and critical first step of that analysis is, of course, to determine whether a regulation is content-based and subject to the highest level of scrutiny. In general terms, the Court defines content-based regulations as those that distinguish between different types of speech and impose benefits or burdens, based upon the subject matter or message of the speech.<sup>83</sup> In most First Amendment litigation, the classification of a regulation is likely to represent the decisive factor in the case, as it did in *Turner*. A clear theory of what constitutes content-based regulation would therefore appear essential to a coherent First Amendment doctrine. At least in the context of mass media regulation, however, the Court has simply failed to articulate such a theory, as the division between the *Turner* majority and dissent reveal.<sup>84</sup>

The first, and probably foremost, fissure between the majority and dissent in their discussions of content relates to the role of "diversity of viewpoints" in the Court's jurisprudence, and, in particular, to the propriety of the government explicitly fostering diversity among speakers and viewpoints. On the one hand, Justice Kennedy and the majority cite, as a government purpose justifying the must-carry regulations, the government's interest in "assuring that the public has access to a multiplicity of information sources," and in assuring "that 'the widest possible dissemination of information from diverse and antagonistic sources' " occurs.<sup>85</sup> Thus, the majority's view is that government policies designed to increase diversity among speakers and viewpoints advance First Amendment values. In contrast, Justice O'Connor's dissent asserts that any government regulation designed to "ensur[e] access to a multiplicity of diverse and antagonistic sources of information" is necessarily based on "the content of what the speakers will likely say," and therefore is highly

82. See *id.* at 2469 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367, 377 (1968)); *id.* at 2479-80 (O'Connor, J., concurring in part and dissenting in part).

83. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2516 (1995); *Turner Broadcasting*, 114 S. Ct. at 2459 (citing *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992); *Boos v. Barry*, 485 U.S. 312, 318-19 (1988); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)).

84. For simplicity, this Article will refer to Justice Kennedy's entire opinion as the "majority," and Justice O'Connor's opinion as the "dissent," without spelling out the shifting majorities, pluralities, and dissents, except where relevant.

85. *Turner Broadcasting*, 114 S. Ct. at 2470 (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))).

suspect constitutionally.<sup>86</sup> As such, the dissent flatly and fundamentally contradicts the majority opinion.

The view expressed by the majority, that the government may, consistent with the First Amendment, take steps to promote diversity of speakers and speech, has deep roots in the Court's First Amendment jurisprudence, and in particular, in the jurisprudence relating to regulation of the mass media. Statements expressing such views can be found in cases as early as 1945,<sup>87</sup> and in a number of subsequent decisions.<sup>88</sup> Academic commentators also have generally written in favor of diversity enhancement as a content-neutral justification for speech regulation.<sup>89</sup> Moreover, the general principles underlying such statements provide the basis for a well-established line of cases in which the Court upheld economic regulation of the press.<sup>90</sup> Finally, the majority's views in this regard are unsurprising. They follow naturally from the "marketplace of ideas" metaphor that

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86. *Id.* at 2477 (O'Connor, J., concurring in part and dissenting in part). The dissent also argues that the must-carry rules are content-based because Congress passed them, in part, because of a preference for speech with particular "local" content, citing the 1992 Cable Act for the proposition that Congress chose to protect broadcasters in the must-carry rules at least in part because "[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services." *Id.* at 2476 (O'Connor, J., concurring in part and dissenting in part) (quoting 1992 Cable Act §§ 2(a)(6), 2(a)(8)(a), 2(a)(10), 2(a)(11), 4(h)(1)(C)(ii), 47 U.S.C. §§ 521(a)(6), 521(a)(8)(a), 521(a)(10), 521(a)(11), 534(h)(1)(C)(ii), 534(h)(2)(B)). Judge Williams' dissenting opinion in the lower court sets forth a similar view. *See Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 58 (D.D.C. 1993) (Williams, J., dissenting), *vacated and remanded*, 114 S. Ct. 2445 (1994).

87. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

88. *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 800 n.18 (1978); *United States v. Midwest Video*, 406 U.S. 649, 668 n.27 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

89. *See, e.g., Brenner, supra* note 4, at 329, 373-74; *Cowles, supra* note 37, at 1275-79. Indeed, in the academic literature there is at least some acknowledgement that diversity enhancement may justify content-based regulation. *See Hawthorne & Price, supra* note 33, at 504-08. *See generally* CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 48-51 (1993) [hereinafter *SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH*] (discussing diversity enhancement with regard to broadcasters). Professor Sunstein in particular provides an impressively thorough and insightful theoretical justification for intrusive governmental regulation, including content-based regulation, of the media.

90. *See, e.g., FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Associated Press v. United States*, 326 U.S. 1 (1945); *NBC v. United States*, 319 U.S. 190 (1943). As discussed *infra* note 108, the level of First Amendment scrutiny to which applications of general economic regulation should be subject remains in dispute.

has dominated recent First Amendment discourse,<sup>91</sup> since it is a presupposition of a working marketplace of ideas that different views are placed in the public arena so that they may compete against each other.<sup>92</sup>

Nonetheless, at some level, the dissent's critique of the majority's position that the must-carry rules are content-neutral is clearly correct. Underlying the concept of diversity, and underlying any government regulation aimed at promoting diversity, is the presumption that *content matters*. If one of the reasons that Congress is seeking to preserve broadcasters at the expense of cable programmers is to enhance diversity in the speech market, then Congress must believe that broadcasters will say things different from cable programmers. As both Justice O'Connor and Judge Williams amply demonstrate, such a belief, particularly the view that "localism" is advanced more by broadcasters than cable programmers, clearly motivated Congress when it passed the must-carry rules.<sup>93</sup> Otherwise, Congress' statements about the value of diversity<sup>94</sup> would be nonsensical.

Moreover, the dissent's views in this regard, that regulation promoting diversity is impermissibly content-based,<sup>95</sup> conform well with another strand of the Court's First Amendment jurisprudence that has been particularly evident in recent years: the development of an extremely strong, formalistic view of what constitutes content-based regulation. Even though at one point in the 1980s, the Court

91. The metaphor originates in Justice Holmes's opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For more recent examples of the Court's reliance on the metaphor, see *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2516 (1995); *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1519 n.11 (1995) (quoting *Abrams*, 250 U.S. at 630); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978)); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377-78 (1984) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)); *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983); *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 537-38 (1980); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

92. For an excellent general description of the marketplace metaphor, and a response to recent critics of it, see Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949 (1995).

93. *Turner Broadcasting*, 114 S. Ct. at 2476-77 (O'Connor, J., concurring in part and dissenting in part); *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 59 (D.D.C. 1993) (Williams, J., dissenting), *vacated and remanded*, 114 S. Ct. 2445 (1994).

94. See S. REP. NO. 92, 102d Cong., 1st Sess. 58 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1191; H.R. REP. NO. 628, 102d Cong., 2d Sess. 63 (1992); 1992 Cable Act §§ 2(a)(8), 2(a)(9), 2(a)(10), 47 U.S.C. §§ 521(a)(8), 521(a)(9), 521(a)(10).

95. *Turner Broadcasting*, 114 S. Ct. at 2479 (O'Connor, J., concurring in part and dissenting in part).

appeared to be weakening its existing doctrine<sup>96</sup> regarding content by stating that any rules "justified without reference to the content of the regulated speech" would be found content neutral,<sup>97</sup> that trend has been firmly reversed in recent years.<sup>98</sup> Instead, recent opinions tend to agree that "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment."<sup>99</sup> Rather, the Court has focused upon whether the challenged regulation on its face or in its purposes appears to rely on the content of regulated speech. As the *Turner* dissent puts it, so long as regulation is "related to the content of speech—to its communicative impact," it is content-based.<sup>100</sup> Thus, even the most seemingly innocuous regulation, if it creates distinctions, imposes burdens, or grants exemptions based on what is said, will be found content-based and likely will be struck down.<sup>101</sup>

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96. Prior to the mid-1980s, the Court's content-based jurisprudence tended to be extremely speech-protective, and the Court generally struck down any regulation that distinguished between speech based on content. See, e.g., *Police Dep't v. Moseley*, 408 U.S. 92, 95 (1972). For a discussion of the development of the "content distinction," and the Burger Court's retreat from earlier speech-protective rhetoric, see Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 66-76 (1994).

97. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis omitted)); see also *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) (finding city ordinance regulating adult motion picture theaters to be content-neutral regulation).

98. For one account of the Court's movement away from the *Renton* analysis of content, see Werhan, *supra* note 96, at 70-76.

99. *Turner Broadcasting*, 114 S. Ct. at 2459 (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983))).

100. *Id.* at 2477 (O'Connor, J., concurring in part and dissenting in part). Contrast this with Justice Kennedy's statement that content-based laws are those that "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Id.* at 2459. This seems a better definition of viewpoint-based, rather than merely content-based, regulation, since it condemns government hostility to the speaker's ideology, not just the subject of the speech. The majority's analysis also focuses heavily on whether the regulation at issue suppresses disfavored ideas, without considering whether it merely favors other speech because of its content. *Id.* at 2458 (asking whether the challenged Government regulation "stifles speech on account of its message"). For an attempt to reconcile the majority's language with extant doctrine, see *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 192-93 n.18 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995).

101. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516-17 (1993) (finding a municipal regulation's distinction between commercial and non-commercial publications to be content-based and therefore invalid); *Simon & Schuster*, 502 U.S. at 116-17 (striking down law placing financial burdens on speech by an accused criminal describing crime); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987) (striking down tax applicable to general interest magazines, but not newspapers or

What all of the above tends to demonstrate is that the critical, first inquiry in the Court's First Amendment "test"—whether a particular regulation is content-based—has devolved into an almost talismanic focus on the word "content" and its meaning in particular contexts, without any consideration of the *reasons* why content-based regulation may be problematic.<sup>102</sup> One particular and especially troublesome manifestation of this phenomenon in the area of media regulation relates to the effect of the Court's "content" jurisprudence on product-based economic regulation of media markets. A distinctive feature of the mass media is that the primary players are economic entities, often of very substantial size and economic might, which operate in markets where the primary "products" sold are speech, and often speech of a particular sort. Thus, the New York Times and CNN sell "general news," SPY magazine and cable's Comedy Network sell (among other things) satire, and The Weather Channel sells weather forecasts.<sup>103</sup> Most of these players sell some package of various kinds of speech. Moreover, the markets in which these media players operate are large, commercially significant, and can often be characterized by concentration, anticompetitive practices, or other problems associated with market failure.<sup>104</sup> Therefore,

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special-interest magazines). This trend has in fact gone so far that in *Discovery Network*, the Court forbade a municipality from drawing a distinction, in the course of regulating newsracks on public property, between commercial publications and newspapers, despite the fact that the Court's own cases (upon which the municipality had relied) accord a lower level of protection to commercial speech. 113 S. Ct. at 1513-17. Of course, recent cases have not entirely eliminated the purpose inquiry. A content-based purpose alone will suffice to trigger strict scrutiny, *Turner Broadcasting*, 114 S. Ct. at 2461 (citing *United States v. Eichman*, 496 U.S. 310, 315 (1990)), but illegitimate purpose is not a necessary condition. See *supra* note 99 and accompanying text.

102. This development brings to mind Justice Holmes's observation that "[i]t is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

103. The case of broadcasters is somewhat more complicated since, as has been pointed out, the true "product" sold by broadcasters is *audiences*, sold to advertisers. See OWEN & WILDMAN, *supra* note 17, at 3-4. Programming, or speech, is an input into the production process. However, because programming is by far the most important input into the production process, and because the content of programming is so intimately related to the makeup of the final product, the viewing audience, the discussion in the text applies to broadcasters largely without change since to regulate broadcasters' "production" of audiences effectively, one must regulate their choice of programming.

104. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 214, 248-50 (1974); *supra* notes 24-31 and accompanying text. The problem of concentration in broadcast, or at least television broadcast, is well-known, given the dominance (at least to-date) of the three major networks.



these markets can be as much in need of governmental regulation as other large and concentrated markets.

The problem is that for economic regulation to be effective it must generally be tailored and industry-specific, focusing on particular product markets.<sup>105</sup> But the product sold in these media markets is speech of a particular content. The economic concepts of a product and product market are rooted in the concept of substitutability—in other words, product markets are defined based on whether, given a variation in price, consumers will shift to available substitute products.<sup>106</sup> In media markets, the question of substitutability turns inevitably on the content of speech. Thus, the *Washington Post* is certainly a substitute for the *New York Times*, and CNN may be a substitute as well, but it seems certain that MTV is not. This is simply a reflection of the fact that consumer preferences in speech markets are aimed at what the speech is, both in form and substance. The consequence of the above is that any economic regulation of speech markets must employ categories based, at least at some formalistic level, on the content of regulated speech,<sup>107</sup> and a rule forbidding any content-based regulation would be tantamount to prohibiting a great deal of potentially important economic regulation in this area.<sup>108</sup>

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105. The problem with employing only general regulatory schemes, such as the antitrust laws, is that it removes from Congress the ability to tailor regulation to the specific structures and problems of an industry.

106. See generally U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES § 1.1 (1992) (describing standards used by the FTC and the Department of Justice to delineate product markets); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 89-91 (1994) (discussing general problems associated with product market definition).

107. In the cable/telco litigation, Bell Atlantic relied on this reasoning to argue that the 47 U.S.C. § 533(b) prohibition on telco provision of "video programming" was a content-based regulation of speech. See *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 922-24 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995). On appeal the Fourth Circuit rejected this argument, but based upon the faulty reasoning that 47 U.S.C. § 533(b)'s definition of "video programming" regulated only "the mode of delivery of the speech." *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 193 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995). In fact, it seems clear that the statute limits not just how the programming is delivered, but also the particular images which may be delivered. See *supra* note 43.

108. This is not to say that all economic regulation must run afoul of the First Amendment, even under the Court's current doctrine. The Court has repeatedly recognized that economic regulations of general applicability may be applied to media markets without necessarily requiring any heightened scrutiny. See *Turner Broadcasting*, 114 S. Ct. at 2458 (citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Associated Press v. United States*, 326 U.S. 1 (1945)). As the *Turner* majority acknowledges, however, even on this point the Court's jurisprudence is unclear as to whether enforcement of such generally applicable economic regulation necessitates any heightened

Such, of course, has never been either the aim of the Court's jurisprudence or the result of the Court's decisions, though with respect to the print media the constitutional *status quo* comes close to this extreme.<sup>109</sup> In other areas, the Court has permitted regulation, but only through the creation of arbitrary exceptions to its background rules, such as in the broadcast context.<sup>110</sup> In *Turner*, moreover, the Court has taken the next step, blurring its analytical distinction between content-based and content-neutral rules in order to sustain regulation.<sup>111</sup> Ultimately, however, such doctrinal manipulation becomes difficult to defend, as Justice O'Connor's dissent in *Turner* amply demonstrates. However, the dissent's apparent solution, simply to enforce the Court's current doctrine to the letter, seems equally unattractive, in light of both the internal contradictions of that doctrine and the inability of the current analysis to cope with the complexities raised by economic regulation of the mass media.

The last substantial difficulty with the Court's current analysis of "content," also highly relevant in the mass media context, has to do with its treatment of speaker-based (as opposed to explicitly content-based) regulation. Speaker-based regulations are those in which the government burdens (or prohibits) the speech of a particular, identifiable group of potential speakers. The modern origins of the Court's treatment of such regulations appear in *Buckley v. Valeo*,<sup>112</sup> in which the Court struck down a federal law limiting the total amount an individual could spend in a single year to support or oppose a particular political candidate, based on the principle that Congress could not "abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other

review, or is subject only to rationality review. *Id.* (comparing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (declining to employ strict scrutiny) with *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-67 (1991) (applying a heightened review)).

109. See, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974).

110. See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 796-97, 814-15 (1978) (upholding cross-ownership restriction on broadcasters); *NBC v. United States*, 319 U.S. 190, 238 (1943) (upholding ownership restrictions for radio stations).

111. For earlier examples of such blurring, in somewhat different contexts, see *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46-47 (1986); *Regan v. Time, Inc.*, 468 U.S. 641, 655-56 (1984); *Regan v. Taxation With Representation*, 466 U.S. 540, 545-46 (1983); and the D.C. Circuit's recent decision in *American Library Association v. Reno*, 33 F.3d 78, 84-87 (D.C. Cir. 1994), *reh'g denied*, 47 F.3d 1215, 1215 (D.C. Cir. 1995).

112. 424 U.S. 1 (1976) (per curiam).

segments of our society.”<sup>113</sup> The cable parties in *Turner* argued that this dictum requires that *all* speaker-based regulations must be subject to strict scrutiny, a position that the Court in *Turner* rejected.<sup>114</sup> Instead, the *Turner* Court said that *Buckley* stood only for the proposition that “laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.”<sup>115</sup> While the Court’s basic conclusion here, that all speaker-based regulations cannot be presumptively unconstitutional, must be correct, the analysis adopted in *Turner* is unsatisfying. First, at a doctrinal level, the *Turner* Court’s reading of *Buckley* is dubious—the regulation struck down in *Buckley* was not directed at a group of speakers associated with any particular view (unless one assumes that all rich people share a political outlook), and did not reflect any clear “content preference.” Second, the *Turner* Court’s treatment of *Buckley* gives no guidance as to *when* a speaker-based regulation “reflects a content preference.” This leaves a good deal of uncertainty in the law, with a concomitant decrease in protection for speech, especially since many speaker-based regulations will have some differential impact on speech.<sup>116</sup>

## 2. The *Ward/O’Brien* Octopus

Under the Court’s First Amendment doctrine, if a regulation is found to be content-based, it is almost automatically un-

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113. *Id.* at 49 n.55.

114. *Turner Broadcasting*, 114 S. Ct. at 2467.

115. *Id.*

116. The Court’s problems have been particularly apparent in its struggles with regulations that single out elements of the press or the press as a whole. Thus in *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 591-91 (1983), the Court struck down a tax that had a substantial disparate impact on members of the press, and in *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227-34 (1987), it reaffirmed this principle. In its subsequent decision in *Leathers v. Medlock*, 499 U.S. 439 (1991), however, the Court upheld the application of a general sales tax to cable operators, even though other members of the media, including print media and satellite-based competitors of cable, were exempted. *Id.* at 444-53. The Court’s reasoning, that the segment of the press singled out in *Leathers* was not sufficiently small to raise the same types of constitutional concerns as in the earlier cases, *id.* at 444-49, was again unsatisfying, because it did not plainly explain *when* such concerns are raised. For a discussion of these cases, see *Turner Broadcasting*, 114 S. Ct. at 2467-69. The *Turner* decision epitomizes the Court’s difficulties: In that case, a five-person majority of the Court found that the distinction drawn in the must-carry rules between broadcasters and cable programmers was not based on content, and did not warrant strict scrutiny, while a four-person dissent found otherwise. See *supra* notes 66-80 and accompanying text.

constitutional.<sup>117</sup> If it is found to be content-neutral, however, it is subject to intermediate scrutiny, and is reviewed under the four-part test now known as the *Ward/O'Brien* balancing test, which in recent years has come to dominate the Court's First Amendment jurisprudence.<sup>118</sup> This is the level of scrutiny to which the *Turner* majority subjected the 1992 Cable Act's must-carry rules, and it is the other major source of difficulty in the Court's First Amendment jurisprudence in the mass media context that this Article seeks to demonstrate.

The current *Ward/O'Brien* test evolved from two different strands of the Court's jurisprudence. The first, which originated in *United States v. O'Brien*,<sup>119</sup> concerned legislation regulating conduct with expressive elements.<sup>120</sup> This strand of the Court's doctrine is concerned with government regulation of *conduct*, a subject that is generally outside of the First Amendment purview, and becomes subject to some heightened scrutiny only because of an incidental burden on speech.<sup>121</sup>

The second relevant strand of the Court's jurisprudence grew out of the Court's "public forum" doctrine, its decisions regarding regulation of speech by the government on government-owned property.<sup>122</sup> That doctrine divides government-owned property into

117. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring); cf. *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (finding a "rare case" where a content-based law survives strict scrutiny).

118. See *infra* notes 121-23 and accompanying text.

119. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

120. In *O'Brien* the Court sustained the criminal prosecution of a Vietnam War protester who burned his draft card, stating that a regulation of expressive conduct will be sustained if "it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

121. For examples of cases examining regulations of expressive conduct, see *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2460-63 (1991) (upholding the constitutionality of a state public indecency statute prohibiting nude dancing); *Texas v. Johnson*, 491 U.S. 397, 410, 419-20 (1989) (reversing on free expression grounds the conviction of a protester who burned the American flag).

122. The doctrine originated in dictum in *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939). The Court's most important recent venture into this area was in *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2711 (1992), in which the Court, by a 5-4 vote, held that the public spaces of airports are not public forums. *Id.* at 2711-12. For a summary (and critique) of the Court's current public forum jurisprudence, see *id.* at 2715-20 (Kennedy, J., concurring in the judgment). Other recent applications of the doctrine include *United States v. Kokinda*, 497 U.S. 720 (1990); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

three types and accords the highest level of protection to speech on property that is designated a "traditional public forum."<sup>123</sup> Even on such property, however, the government may regulate the "time, place, and manner" of protected speech on a content-neutral basis,<sup>124</sup> and in *Ward v. Rock Against Racism*,<sup>125</sup> the Court definitively set out the standards under which such "time, place, and manner" regulations would be judged.<sup>126</sup> Thus, this strand of the Court's doctrine, like the cases on expressive conduct, relates to an area of government activity—regulation of use of its own property—where the government often has reasons to act that are entirely unrelated to speech.

In recent years, these two theoretically quite distinct areas of the Court's doctrine have merged, as the Court in a number of decisions has recognized that its tests for expressive conduct and for time, place, or manner regulations are essentially identical.<sup>127</sup> The consequence of these decisions has been that the *Ward* statement of the test has become the standard formulation, applicable in all cases involving expressive conduct or time, place, or manner restrictions. Additionally, during the past several years, the Court has apparently begun to merge its jurisprudence regarding regulation of "commercial speech" into the *Ward/O'Brien* test. In its commercial speech cases, the Court has set forth constitutional limits on the ability of governments to regulate purely "commercial" speech such as advertisements.<sup>128</sup> Recently the Court has remarked that its First Amendment analysis of regulations of commercial speech is "substa-

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123. Thus content-based restrictions on speech in traditional public forums are subject to strict scrutiny. See *Perry Educ. Ass'n*, 460 U.S. at 45. The other categories are "designated public forums" and "nonpublic forums," with respect to which the government has ever-increasing discretion to regulate speech. See *International Soc'y for Krishna Consciousness*, 112 S. Ct. at 2715-16 (Kennedy, J., concurring in the judgment); Werhan, *supra* note 96, at 76-85.

124. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

125. 491 U.S. 781 (1989).

126. *Id.* at 790-803. Such regulations will be upheld "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Id.* at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

127. See, e.g., *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2460 (1991); *Ward*, 491 U.S. at 798; *Clark*, 468 U.S. at 298 & n.8.

128. The Court first set forth its commercial speech "test" in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), though the modern doctrine itself can be traced back to *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758-70 (1976). A recent application of these principles can be found in *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995).

ntially similar" to the *Ward/O'Brien* test, suggesting that in coming years the *Ward/O'Brien* formulation will come to govern commercial speech regulation as well.<sup>129</sup>

These doctrinal developments represent a pattern of gradual expansion of the scope of the *Ward/O'Brien* test. As described above, the test has relatively narrow roots, based on very particular strands of the Court's First Amendment jurisprudence. As these strands have merged in recent years, however, the *Ward/O'Brien* test has been evolving slowly into a general standard for review of speech regulations that are not subject to strict scrutiny, but which, because they do burden speech, should be subject to some heightened scrutiny. In *Turner*, that evolution seems to have reached its apogee, when the Court applied the *Ward/O'Brien* test to a direct and general regulation of speech that was neither a general regulation of conduct, a regulation of speech on government property, nor a regulation of purely "commercial" speech.<sup>130</sup>

The expansion of the *Ward/O'Brien* test, without any commensurate changes in its formulation, is extremely problematic because the test is by its nature *ad hoc*, that is, it seeks to balance governmental interests entirely unrelated to speech with burdens on free expression. Indeed, given the roots of the *Ward/O'Brien* test and the theoretical difficulty of balancing such dissimilar values as, for example, the burden on speech created by prohibiting overnight demonstrations in a park against the disruptive effects of permitting the demonstration, some degree of arbitrariness may be inevitable.<sup>131</sup> In both the expressive conduct and public forum contexts, the government is generally engaged in endeavors that are unrelated to speech and are well within the authority of the government. The governmental interests asserted to justify such regulation are thus generally unrelated to speech issues.<sup>132</sup>

129. See *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989).

130. One should understand that the fact that cable operators are "commercial" enterprises does not make their speech "commercial speech." The Court's definition of commercial speech is far narrower, encompassing only speech "which does 'no more than propose a commercial transaction.'" *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1512-13 (1993).

131. See generally Symposium, *When is a Line as Long as a Rock is Heavy?: Reconciling Public Value and Individual Rights in Constitutional Adjudication*, 45 HASTINGS L.J. 707, 707-1104 (1994) (presenting various points of view on the problems of balancing tests in modern judicial practice).

132. Indeed, this lack of relationship was originally a requirement of the *Ward/O'Brien* test, though in later cases the formulation has been weakened, so that now the interest must only be unrelated to the *content* of the regulated speech. See *United States v.*

Therefore, when the government regulates in these areas, whether it is regulating the harmful effects of conduct, or circumscribing speech on government property to protect the other uses of that property, the First Amendment analysis inevitably requires balancing the degree to which the regulation burdens speech against the importance of the government interest asserted. Because there is no obvious way to compare such disparate values, this analysis leads to an extremely subjective, and somewhat arbitrary and unpredictable doctrine.<sup>133</sup> Furthermore, the difficulty of the analysis required by *Ward/O'Brien* has inevitably pushed the Court to increase the deference the government receives during judicial review, thereby weakening the test and decreasing the constitutional protection for speech.<sup>134</sup> Even aside from any weakening, however, for the reasons discussed above the *Ward/O'Brien* analysis is by its nature ill-defined, and probably unavoidably so. The only factor that has made the *Ward/O'Brien* test tolerable in the past is that the Court has only applied it in relatively narrow contexts in which the government has imposed burdens on speech that are either incidental or circumscribed.

None of these limitations hold true, however, in a case like *Turner*, in which the Court is reviewing a direct and far-reaching government regulation of private speech that uses private resources.<sup>135</sup> Such regulations raise far more serious concerns as to their effects on speech and so should not be subject to the generally *ad hoc* analysis of *Ward/O'Brien*. Moreover, they need not be. This is because a direct government regulation should be (and is likely to be) justified on the basis of First Amendment policy, since there is no

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O'Brien, 391 U.S. 367, 377 (1968).

133. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 973 (1987) (criticizing the validity and lack of logical basis of balancing tests); Brenner, *supra* note 4, at 362-63 (describing the *Ward/O'Brien* test's "predictive value [as] dubious"); Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 837-843 (1994) (summarizing the debate over balancing); Werhan, *supra* note 96, at 60-61, 61 n.60 (quoting Benno C. Schmidt, Jr., *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 463-64 (1977)) (summarizing long-standing debate over use of *ad hoc* balancing in First Amendment analysis).

134. The most important example of this phenomenon is the severe weakening of the "narrow tailoring" prong of the test in *Ward v. Rock Against Racism*, where the Court held that to be narrowly tailored for the purposes of *Ward/O'Brien*, a regulation must merely be "reasonable." 491 U.S. 781, 799 (1989).

135. Cable operators certainly use some public resources, such as conduits and public ways, in their operations, but this fact does not provide any justification for the must-carry rules—nor could it, since the resources utilized are generally municipal, while the must-carry rules are federal.

obvious other reason (such as the harmful effects of conduct, or the need to control the government's own property) for the government to undertake such regulation. As a result, the judicial balancing required in cases like *Turner* need not be *ad hoc*; rather, a reviewing court should weigh burdens on speech against other speech-related policies so that it may judge whether or not the challenged regulation, on balance, furthers free speech interests, whatever those interests may be.<sup>136</sup>

Of course, this approach would be a departure from the typical *Ward/O'Brien* analysis. But such a departure seems justified, given the difficulties of applying the *Ward/O'Brien* analysis to regulations such as must-carry. These difficulties are reflected in the enormous disagreements among the Justices in *Turner* over the proper application of the Court's supposedly "well-settled" First Amendment analysis. For example, the majority and dissent disagreed sharply over both the legitimacy of the government's asserted interest in promoting diversity,<sup>137</sup> and over the strength of the government's asserted interest in preserving free broadcasting.<sup>138</sup> The majority and the dissent also evinced quite disparate approaches to the "narrow tailoring" prong of the *Ward/O'Brien* test. The dissent, in the course of arguing that the must-carry rules were overbroad and so failed intermediate scrutiny, clearly put far more teeth into the narrow tailoring requirement than the Court's previous decisions, including in particular the "reasonableness" formulation adopted in *Ward v. Rock Against Racism*,<sup>139</sup> would appear to permit.<sup>140</sup> The majority, even though purporting to follow *Ward/O'Brien* and defer to Congress on the choice of regulatory scheme, had a great deal of difficulty describing how the lower court, on remand, should evaluate either the

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136. Such an analysis would also require reviewing courts to consider the availability of other, less burdensome regulatory strategies that might better advance speech policy.

137. Compare *Turner Broadcasting*, 114 S. Ct. at 2470 (asserting that public "access to a multiplicity of information sources is a governmental purpose of the highest order") with *id.* at 2477 (O'Connor, J., concurring in part and dissenting in part) (arguing that promoting diversity is, by its very nature, a content-based regulation of speech). See also *supra* notes at 84-94 and accompanying text (discussing differences between the majority and dissent in *Turner* as to "diversity of viewpoints").

138. Compare *Turner Broadcasting*, 114 S. Ct. at 2469-70 (finding the interest to be an "important" one) with *id.* at 2480 (O'Connor, J., concurring in part and dissenting in part) (finding the interest in free television insufficient to support broad must-carry requirements).

139. 491 U.S. 781, 799 (1989); see *supra* note 134.

140. *Turner Broadcasting*, 114 S. Ct. at 2479-80 (O'Connor, J., concurring in part and dissenting in part).



adequacy of the government interests or the need for the must-carry rules.<sup>141</sup> In other words, both the majority and dissent struggled with, but were unable to overcome, the theoretical inconsistencies of applying the *ad hoc Ward/O'Brien* test in this context, in which a more focused analysis was appropriate.

### C. Current Doctrine and Models of the Market

The Court's traditional First Amendment doctrine has never worked well when applied to regulations of the modern mass media. Until now, the Court has circumvented these problems through arbitrary manipulation of its doctrine. Recent technological developments, however, have created vast, new mass media networks and facilities, including especially cable television, which require extensive regulation because of their physical and economic characteristics. These developments have found the courts unprepared and lacking a theoretical model for evaluating the constitutionality of these new regulations. The *Turner* decision reflects this unpreparedness.

That technological change has produced doctrinal difficulties is, of course, unsurprising. The current confusion, however, cannot be attributed only to changing technologies. Rather, the courts' difficulties in adjusting to new demands reflect an underlying problem—an inconsistency between the Supreme Court's model of First Amendment free speech rights and the realities of modern media markets. As Owen Fiss has observed, the Court's First Amendment model and jurisprudence are premised on "protection of the street corner speaker."<sup>142</sup> This view sees the role of the courts as that of defending the right of individuals to speak in the face of governmental oppression, and the ultimate purpose of the First Amendment as permitting political discourse, because it is an essential element of democratic institutions.<sup>143</sup> Professor Fiss's primary

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141. *Id.* at 2470-72. Moreover, Justice Kennedy was unable to gather a majority for this portion of his opinion. Indeed, there was an extraordinary amount of disagreement among the Justices over the appropriate level of deference to Congress, ranging from almost total deference, *id.* at 2472-73 (Blackmun, J., concurring); *id.* at 2473-75 (Stevens, J., concurring in part and concurring in the judgment), to some deference, *id.* at 2470-71, to essentially no deference, *id.* at 2480 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2481 (Ginsburg, J., concurring in part and dissenting in part).

142. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986).

143. *Id.* at 1409-10. Professor Fiss traces this view of the purposes of the First Amendment to Harry Kalven and Alexander Meiklejohn, and indicates that such a view is widely shared today, citing among others Lee Bollinger and Robert Bork. *See id.* at 1409 nn.19-21 (citing Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J.

criticism of this traditional position is that it presumes that the critical values it seeks to defend—individual autonomy and rich public debate—are consistent with each other. According to Professor Fiss, in an era when huge electronic media enterprises control most information flowing to the public, that assumption simply fails. The First Amendment, therefore, should not prohibit limited regulation of what the broadcast media can say.<sup>144</sup>

Drawing upon these and other ideas, Cass Sunstein has advanced an even stronger (and more interventionist) critique of current First Amendment doctrine. Relying heavily upon the writings of James Madison and the First Amendment dissents of Justice Louis Brandeis, Professor Sunstein argues that the primary purpose of the First Amendment is to protect and encourage the “deliberative discourse” necessary to a well-functioning democracy with an active and participatory citizen body.<sup>145</sup> Proceeding from this premise, and from arguments about the effect of the New Deal on the concept of “state action,” Professor Sunstein concludes that the strong, current bias in First Amendment law against state intervention in private decisions about speech should be reconsidered. In particular, he argues that when private choices are *not* fostering political deliberation and a diversity of speakers and ideas, the First Amendment supports, and may even require, government action designed to foster such discourse and diversity. In pursuit of these goals Professor Sunstein advocates and defends extensive regulation, including content-based regulation, of the mass media.<sup>146</sup>

The criticisms leveled by Professors Fiss and Sunstein are certainly well-taken, and in fact, the doctrinal difficulties recounted above clearly reflect the theoretical inconsistencies that they identify. In particular, the Court’s great difficulties in analyzing “content” are closely tied to the Court’s First Amendment “model.” Most importantly, the conflict between the *Turner* majority and dissent over the role of “diversity enhancement” in First Amendment doctrine is a

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438 (1983); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971)).

144. Fiss, *supra* note 142, at 1410-16.

145. SUNSTEIN, *supra* note 89, at xvi-xviii, 17-28. Professor Sunstein contrasts Brandeis’s views with the “marketplace of ideas” metaphor championed by his frequent co-dissenter Justice Oliver Wendell Holmes and suggests that Holmes’s jurisprudence contains an internal inconsistency because it posits a skeptical view of “truth,” and yet assumes that some concept of truth will emerge from “competition” between ideas. *Id.* at 23-28.

146. See *id.* at 53-92.

product of the Court's "model" of First Amendment speech. The Court's model is one of an atomistic marketplace, combining Justice Holmes's "marketplace of ideas" metaphor—which, as Professor Sunstein argues, has dominated the Court's First Amendment jurisprudence<sup>147</sup>—with the "street corner speaker" identified by Professor Fiss.<sup>148</sup> In such a world, speakers and listeners are plentiful, no individual speaker plays an essential or unique role in the debate, that is, speakers are fungible, and no speaker or listener possesses "market power" in the marketplace of ideas in the sense of being able to shape significantly, on her own, the ideas and preferences of others. In such a world, the First Amendment value in diversity and the prohibition of content-based regulation do not conflict, because in such a world an unregulated market and a *laissez-faire* governmental policy are the best means to ensure diversity. Thus it is that the *Turner* majority is able to condemn all content-based regulation, and yet laud governmental efforts to enhance speaker diversity, while the *Turner* dissent is able to claim that *any* effort to produce diversity presumptively violates the First Amendment.

That free competition can be equated with diversity of speakers and ideas in an atomistic market for speech is not a new insight.<sup>149</sup> Professor Fiss, citing Ronald Coase and Aaron Director, explicitly identifies modern free speech law as the most important surviving strand of a general plea for *laissez-faire* and limited government.<sup>150</sup> The problem, of course, as Professor Fiss also points out, is that the underlying assumption of the Court's model simply does not hold with regard to the mass media, especially the electronic media.<sup>151</sup> Speakers are not numerous, nor are they fungible, and the speech choices made by one or a concentrated few members of the media most certainly do influence the preferences of viewers and listeners.

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147. See *id.* at 34. In Professor Sunstein's view this domination is unfortunate. I am less certain. See *infra* part II.A.2.

148. See Fiss, *supra* note 142, at 1408.

149. Indeed, the FCC has proceeded on just this premise in trying to ensure diversity in the course of allocating radio spectrum. See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 600-01 (1981).

150. Fiss, *supra* note 142, at 1414 & n.26 (citing Ronald Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. PROC. 384 (1974); Aaron Director, *The Parity of the Economic Market Place*, 7 J. LAW & ECON. 1 (1964)). Professor Kathleen Sullivan has similarly identified the argument against government regulation of speech markets with Coase, Director, Richard Epstein, and the libertarian ideology of the Chicago School of economics. See Sullivan, *supra* note 92, at 952-53.

151. See Fiss, *supra* note 142, at 1409-10.

In such a world—the world faced by the *Turner* court—a prohibition on all content-based regulation may not further the First Amendment value in diversity.<sup>152</sup>

The other difficulties the Court has faced in drawing the boundaries of upper-tier review in the First Amendment area are also closely tied to the Court's vision of the speech market. Inherent in the Court's atomistic model is an assumption of a *unitary* market, in which speakers and speech can be substituted for one another. In the world of the street corner speaker, that may be a reasonably accurate description of the world; speaking on a soapbox may well have been a substitute for distributing (or selling) a pamphlet or flyer. In the world of the electronic media, however, that is almost certainly not the case. Speaking in a city park is certainly not a substitute for delivering a speech on primetime television. Indeed, it is not clear that having the same speech reprinted in every major daily newspaper would be a sufficient substitute. From this conundrum arises the Court's confusion in reviewing regulation that is content-based because it focuses on product markets.<sup>153</sup> If all speech is fungible, then such regulation appears pernicious, because it singles out particular speech; but if separate speech markets exist, then it is surely not problematic to regulate those markets separately, even if there is some independent requirement of evenhandedness in that regulation.

Finally, these theoretical problems also contribute to the Court's struggles in addressing speaker-based regulations, as well as its difficulties in applying *Ward/O'Brien* to mass media regulation. The relationship is in fact very similar in both cases—it arises from the assumption that speakers are fungible. In a world of many speakers, in which none is uniquely well-situated, it is not likely to be a rational strategy to target one or a narrow group of speakers if one's purpose is to control debate. The censorship or punishment must be clearly tied to the *content* of that speaker's message; otherwise, someone else will simply step in to say the same thing. Also, the deterrence message might otherwise not be clearly communicated. Thus, under the traditional view it is not terribly troublesome when regulation singles out a speaker, or when the government burdens or silences particular speech for non-speech related reasons. In the first case,

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152. In fact, in such a world, as discussed below in part II.A.1, *infra*, the meaning of diversity is not always obvious since, from the perspective of the media itself, the concept of diversity may be associated more with diversity of product offerings with mass appeal, such as sitcoms, cop shows, and news analysis, than with diversity of viewpoints.

153. See *supra* notes at 102-08 and accompanying text.

other speakers will step in, and in the second case, other opportunities to speak exist. In the world of the mass media, of course, neither of those assumptions necessarily holds because scarcity—both of speakers and of speaking opportunities—is very much the rule with regard to the mass media, thus explaining the *Turner* Court's difficulties in determining whether a law favoring broadcasters over cable programmers is problematic, and whether the must-carry rules are "narrowly tailored."

Despite inherent weaknesses, the Court's basic two-tier analysis of First Amendment issues, with its strong bias against regulation, has performed relatively well in defending individual speakers—generally dissidents with unpopular views—from direct censorship by the government.<sup>154</sup> The categories of that analysis are premised on the existence of an atomistic marketplace of speech, speakers, and listeners; and when those assumptions hold, the categories are generally workable. With respect to regulation of the modern mass media, however, where those assumptions assuredly do not hold, the Court's categories tend to collapse, and its analysis consequently fails.<sup>155</sup> What is needed at this point is a rethinking of those categories and the underlying doctrine, based on a more realistic model of mass media markets. At the least, such a reappraisal must take into account the role of the mass media in today's society, including its power to shape preferences and discourse through a process of socialization. This is not enough, however. The analysis must also take into account the danger that the government will seek, through regulation of the media, to take control of that process itself, since this is the primary danger addressed by the First Amendment. It is to that theoretical rethinking that this Article will now turn.

## II. A NEW PARADIGM, OR TAKING MARKETS SERIOUSLY

### A. *Diversity and the Marketplace Metaphor*

Any attempt to formulate a new framework for First Amendment analysis of mass media regulation must begin by considering what the

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154. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 410, 419-20 (1989) (holding that burning an American flag in protest is protected expression under the First Amendment); *Cohen v. California*, 403 U.S. 15, 22-26 (1971) (holding that protesting the Vietnam War with profane language is protected expression); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (holding that a statute criminalizing the "mere advocacy" of violence is unconstitutional).

155. See *supra* notes 102-16 and accompanying text.

basic purposes and goals of the First Amendment in this area should be. Only after identifying those policies may one consider what mechanisms, both doctrinal and regulatory, seem most likely to advance them. As a starting point, therefore, I should state that I hold a frankly instrumental view of the First Amendment's speech provisions; I believe that the primary purpose of those provisions is to permit and advance democratic self-government, rather than to advance individual self-actualization or autonomy. The instrumental view of the First Amendment was prominent in the writings of Alexander Meiklejohn,<sup>156</sup> and in recent years has been championed by, among others, Professors Cass Sunstein,<sup>157</sup> John Hart Ely,<sup>158</sup> and Owen Fiss.<sup>159</sup> It is beyond the scope of this paper to defend my instrumental approach,<sup>160</sup> but suffice to say that such a view seems to be more consistent with the Madisonian roots of the First Amendment, the juxtaposition of the First Amendment's Speech and Press provisions with the Assembly and Petition provisions,<sup>161</sup> and the general structure of the Bill of Rights as a defense against tyranny. None of which is to say, of course, that there is *no* First Amendment interest in promoting autonomy and self-actualization; I only suggest that this is not the most important goal of the First Amendment. Further, in the area of mass media regulation, the

156. See ALEXANDER MEIKELJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

157. SUNSTEIN, *supra* note 89, at 121-66; CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 233-42, 253-56 (1993) [hereinafter SUNSTEIN, *THE PARTIAL CONSTITUTION*].

158. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 43-72 (1980).

159. For a discussion of the two different views of the First Amendment, see Fiss, *supra* note 142, at 1409-10. Professor Fiss identifies Harry Kalven, Robert Bork, and Lee Bollinger as among those who share his instrumental approach. *Id.* at 1409 n.21. Professor C. Edwin Baker is a leading modern proponent of the opposing view, that the First Amendment should be understood primarily to promote individualistic values. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47-69 (1989); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-96 (1978); see also THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 4-7 (1966) (arguing that individual self-fulfillment through free expression is a fundamental element of Western society). For a fascinating discussion of different autonomy-based approaches to the First Amendment and their theoretical difficulties, see Richard Fallon, *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994).

160. For a strong and convincing defense of an instrumental approach to First Amendment interpretation, see SUNSTEIN, *supra* note 89, at 121-66; SUNSTEIN, *THE PARTIAL CONSTITUTION*, *supra* note 157, at 231-40, 251-54.

161. The First Amendment provides that Congress shall make no law "abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

instrumental component of First Amendment policy must be predominant, because of the importance of the mass media in modern society and politics.<sup>162</sup>

Some basic principles follow quickly from my premise. First, the First Amendment is primarily a limitation on governmental power, and the primary danger to which it is addressed is governmental entrenchment facilitated by control or manipulation of public debate.<sup>163</sup> Second, a successful speech policy must create both discussion and disagreement, or in Justice Brennan's words, a debate that is "uninhibited, robust, and wide-open."<sup>164</sup> From these principles follows the view<sup>165</sup> that the First Amendment places a premium on encouraging a diversity of speakers who set forth a diversity of viewpoints. As discussed above,<sup>166</sup> this view has driven a substantial portion of the Supreme Court's First Amendment jurisprudence, especially in the mass media area,<sup>167</sup> and is also a linchpin of the majority opinion in *Turner*.<sup>168</sup> Congress also identified the advancement of diversity as an important interest served by the Cable Act's must-carry rules.<sup>169</sup> The FCC has similarly stated that one of the purposes of its Video Dialtone rules is to "foster[] the First Amendment goal of ensuring a diversity of information sources."<sup>170</sup> Finally, the academic commentary has generally been in

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162. Thus even a theorist who generally favors an autonomy-based approach to speech issues might agree that in the mass media context, where speakers tend to be major corporations and the political consequences of speech policy are profound, an instrumental approach is preferable.

163. Even the strongest critics of private power in speech markets agree that the First Amendment is *primarily* directed against governmental abuse. See, e.g., Cass Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L.J. 137, 140 (1994). Of course, private power can also pose a serious threat to free and open debate, but as I discuss in part II.A.2, *infra*, there is no nonarbitrary basis upon which the government can directly regulate private speech. The best response to private power, therefore, is to trust competitive speech markets to break down that power, and to adopt regulatory strategies which foster such markets.

164. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

165. See SUNSTEIN, *THE PARTIAL CONSTITUTION*, *supra* note 157, at 252-55; Fiss, *supra* note 142, at 1411.

166. See *supra* notes 87-92 and accompanying text.

167. See, e.g., *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

168. See *Turner Broadcasting*, 114 S. Ct. at 2470.

169. See S. REP. NO. 92, 102d Cong., 1st Sess. 58 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1191; H.R. REP. NO. 628, 102d Cong., 2nd Sess. 28, 63 (1992).

170. *National Cable T.V. Ass'n v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994) (quoting Video Dialtone Order, *supra* note 10, 7 F.C.C.R. at 300, 304).

accord, and has, if anything, argued that the Court has not sufficiently protected the diversity interest.<sup>171</sup>

Thus far, there is broad agreement. Where the difficulty arises, and where I depart from most proponents of "diversity," is in defining what it means to promote diversity in speakers and viewpoints. In the mass media context especially, these concepts raise profoundly difficult philosophical and intellectual issues. Most proponents of diversity define the universe of relevant viewpoints, and for that matter speakers, quite narrowly. In particular, their focus is on explicitly political speech, directed largely at the electoral process.<sup>172</sup> Given the profound influence that the modern mass media has in forming and shaping our culture, including our political culture and preferences, however, such a narrow definition is simply inadequate. It fails to take into account the degree to which our general culture circumscribes what we view as political, and how much the homogeneity of that culture is itself a profoundly political result.

### 1. Socialization and Diverse Voices

A substantial strand of modern writing about the First Amendment emphasizes the need for First Amendment doctrine to focus on the political, and to advance diversity within the political arena. Alexander Meiklejohn saw such a "political bias" as following from his instrumental view of the First Amendment,<sup>173</sup> and recently Cass Sunstein has forcefully advanced such a position.<sup>174</sup> Professor Sunstein goes well beyond most of his predecessors, however, in that

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171. See *supra* note 89 for a summary of the academic commentary on this point. Professor Sunstein in particular has argued strongly that an instrumental First Amendment approach demands that the public be exposed to diverse viewpoints and that current doctrine does not achieve that goal. See SUNSTEIN, *supra* note 89, at 21-23.

172. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 94 (1948) (maintaining that the First Amendment protects only "speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to considerations of matters of public interest"); SUNSTEIN, *THE PARTIAL CONSTITUTION*, *supra* note 157, at 236-39 (explaining that the highest level of protection under the First Amendment should be reserved for speech "when it is both intended and received as a contribution to public deliberation about some issue"); SUNSTEIN, *supra* note 89, at 130-37 (same); FISS, *supra* note 142, at 1413 (describing that "from the perspective of a free and open debate," the choice of entertainment programming by television networks is "trivial"). For a similarly narrow definition of political speech by the Supreme Court, see *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1518-19 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976)).

173. See MEIKLEJOHN, *supra* note 172, at 94.

174. See SUNSTEIN, *THE PARTIAL CONSTITUTION*, *supra* note 157, at 232-56; SUNSTEIN, *supra* note 89, at 121-66.



he advocates even positive government actions that advance political diversity.<sup>175</sup> Inherent in this position is a strong view of what types of speech are important to democratic government—in other words, what sorts of speech are “political,” in the First Amendment sense. Professor Sunstein, for example, explicitly states that the First Amendment should primarily value speech that contributes to “democratic deliberation” through a process of rational argumentation in a setting of political, though not necessarily economic, equality.<sup>176</sup> Professor Sunstein does not advance these views simply as his own, but rather as the political system favored by James Madison, the primary drafter of the First Amendment. Sunstein argues that because of Madison’s central role, Madison’s views on the nature of the political system created by the Constitution, and the role of free speech within that system, are due substantial deference.<sup>177</sup>

It is here that I must part with Professor Sunstein, and in general with the view that “political speech” exists as a separate, definable category. First, it is doubtful whether we must, or should, incorporate the specific political theories of Madison or any of the Founding generation into our First Amendment analysis. The text of the First Amendment does not contain any such limitation. Also, given both the enormous growth of this country in the past 200 years, in population and in the scope of the electoral franchise, and the cultural and technological changes that have accompanied this growth, the Founders’ views of politics do not seem to have much applicability to modern America. Furthermore, and more fundamentally, we presumably know more today than did Madison and his contemporaries. Two hundred years ago economics was in its infancy, and the political theory of the liberal state was just coming into being. Moreover, only in the twentieth century have we developed some theoretical understanding of human psychology. Finally, the second half of this century has witnessed the achievement of substantial philosophical insights into the role of language and social structure in the formation of culture and preferences. All of these things are obviously and fundamentally relevant to a coherent theory of what constitutes politics and what role speech plays in social governance. My starting point, therefore, is that we take modern learning seriously and incorporate it into our First Amendment theory.

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175. SUNSTEIN, *supra* note 89, at xix.

176. *Id.* at xvi-xviii.

177. *Id.* at xvi-xvii, 121-24, 132-33; SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 157, at 20-24.

The first casualty of modern theory is the assumption, implicit in the writings of Meiklejohn and Sunstein, that political discourse must, or even can, proceed at a purely rational level. The Founders, children of the Enlightenment that they were, may well have had faith in a rational humanity,<sup>178</sup> but surely after Freud and after the cataclysmic history of this century, we are more doubtful.<sup>179</sup> Furthermore, philosophers such as Ludwig Wittgenstein have destroyed the myth of language as a neutral conduit for ideas and have demonstrated how speech and moral understandings incorporate enormous social and cultural assumptions.<sup>180</sup> Taken together, these insights suggest that the manner in which political ideas are expressed, and the force they have, is fundamentally dependent on the cultural milieu shared by speakers and listeners. Indeed, that milieu sets limits upon what may be said, and even what ideas can be communicated, within the bounds of socially acceptable (or even comprehensible) discourse.

Second, twentieth century writings in the areas of social theory and the social sciences suggest that culture and social structure, and

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178. See generally CARL L. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* (1932) (analyzing the rationalistic world-view encapsulated in the writings of Enlightenment philosophers).

179. For a general intellectual history of the movement towards irrationalism in twentieth century thought, see W. WARREN WAGAR, *WORLD VIEWS: A STUDY IN COMPARATIVE HISTORY* 241-65 (1977); for a discussion of the roles of Freud and modern psychoanalysis in this movement, see *id.* at 153. For a discussion of the role of rationality in the receipt of speech and its relevance for First Amendment theory, see Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 31-48 (arguing that First Amendment doctrine should reflect the fact that forms of persuasion often matter as much as the underlying message). On the limits of the idea of rationality and the need to understand rationality within a cultural context, see Amartya Sen, *Internal Consistency of Choice*, *ECONOMETRICA* 415, 495-521 (1993).

180. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶¶ 7, 10, 13, 37-38, 47, 116, 180, 241-42, 337-38, 340 (G.E.M. Anscombe trans., 3d ed. 1958) (providing a basic description of the "language-game," and its relationship to community and to thought); WITTGENSTEIN AND LEGAL THEORY (Dennis Patterson ed., 1992) (discussing the implications of Wittgenstein's ideas for legal theory); *id.* at 33-39 (setting out the core of Wittgenstein's views on language and community, as described by Thomas Eisele); Dennis Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement under Article 9* 137 U. PA. L. REV. 335, 358-69 (1988) (elucidating Wittgenstein's views on the "grammatical nature of understanding," and discussing recent commentary on the subject); *id.* at 362-63 & n.88 (concluding from Wittgenstein's arguments that "epistemology is social" and that understanding is rooted in social practice); see also MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 269-75 (1987) (noting the effect of the reification of legal categories on legal doctrine); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 147-54, 173-74, 179-83 (1982) (discussing the primary role of the constitutive community in the identification of moral ends).

the process of socialization that creates and defends those basic characteristics of our society, play a far more fundamental role in defining the political direction of our society than does the political discourse that is permitted within the bounds of that culture. Critical Theory, as developed by the Frankfurt School and its postmodernist successors,<sup>181</sup> has much to offer here. The writings of the Frankfurt School and others compellingly demonstrate how the process of socialization, especially in modern American culture, protects and creates acceptance of social hierarchies and the status quo.<sup>182</sup> Especially significant for the purposes of my analysis is Critical Theory's critique of popular culture and the mass media, including in particular its arguments regarding the activities of the mass media. These arguments hold that such activities, in defining a homogeneous popular culture, are profoundly political in nature, because culture defines the presuppositions, the categories, and the limits of politics.<sup>183</sup> Thus, the School decried the purported tendency of mass culture, the "culture industry," to divert dissatisfaction and protest into "conformity and resignation," claiming that this in itself was a profoundly political action.<sup>184</sup> Under this view, the mass media plays an essential role in inculcating, or perhaps reinforcing, basic political values through sheer repetition of the message that the basic

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181. For an excellent, general history of the Frankfurt School and Critical Theory, see MARTIN JAY, *THE DIALECTIC IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE FOR SOCIAL RESEARCH, 1923-1950* (1973). For a summary of the application of Critical methodology by Critical Legal Studies scholars to legal theory, see KELMAN, *supra* note 180. For a discussion of the relationship between the CLS movement and broader Critical Theory, see *id.* at 9-11, 300-03 n.17.

182. See KELMAN, *supra* note 180, at 267-68 (discussing the defense of the concept of "order legitimation," that is, "the spreading of the perception that the system is generally just because each of a series of legal decisions that, when taken together, represent the sociopolitical order is itself affirmatively justified").

183. Probably the best-known exposition of the Frankfurt School's critique of American mass culture can be found in Herbert Marcuse's *ONE DIMENSIONAL MAN* (1964) [hereinafter MARCUSE, *ONE DIMENSIONAL MAN*]. See also HERBERT MARCUSE, *EROS AND CIVILIZATION* (1955) (discussing the contributions of Freud); JAY, *supra* note 181, at 212-18 (providing a general history of the Frankfurt School and Critical Theory). Among the major works in the Frankfurt School's analysis of mass culture identified by Jay are (in addition to Marcuse's writings): Max Horkheimer, *Art and Mass Culture*, in *STUDIES IN PHILOSOPHY AND SOCIAL SCIENCE IX*, 290-325 (1941); THEODOR ADORNO & MAX HORKHEIMER, *DIA LEKTIK DER AUFKLÄRUNG* (Dialectic of the Enlightenment) (1944); LEO LOWENTHAL, *LITERATURE, POPULAR CULTURE, AND SOCIETY* (1961).

184. See JAY, *supra* note 181, at 216-17 (citing ADORNO & HORKHEIMER, *supra* note 183, at 166-87; MARCUSE, *ONE DIMENSIONAL MAN*, *supra* note 183, at xi); see also KELMAN, *supra* note 180, at 300 n.17 (relating Marcuse's views in this regard to the Critical Legal Studies analysis of the role of legal doctrine in pacifying dissent).

American political institutions are flawless and ideal.<sup>185</sup> The most important conclusion one can derive from this aspect of Critical Theory's cultural analysis is that even if one believes that our political system is a fundamentally sound one, there can be no doubt of the *political* nature of the mass media's "cultural" and "entertainment" offerings, which promote this message.<sup>186</sup>

The insights of Critical Theory are especially important to the topic of this Article because of the paramount role of the video mass media in the socialization process. The power of video to shape values and ideas, especially at a subrational level, cannot be underestimated, and it is surely not controversial at this stage to assert the central role of television in the formation of American culture and politics.<sup>187</sup> The central role of television in our political elections has frequently been commented on and decried.<sup>188</sup> Video can transmit ideas more efficiently and effectively than any other form of speech; and very often, the ideas are essentially political, even when they do not purport to be.<sup>189</sup> Police shows certainly express a clear viewpoint as to the appropriate roles in our society of the

185. One consequence of this role is said to be the total elimination from this country of radical political movements with any degree of popular support, since the advent of broadcasting. See KELMAN, *supra* note 180, at 300 n.17.

186. For discussions of the role of the mass media in defining the bounds of politics, and its relevance for the First Amendment, see, e.g., Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581, 582-83 & n.7 (1984); Ingber, *supra* note 179, at 38-40. On the tendency of the mass media to endorse and inculcate incumbent values and institutions, see SHANTO IYENGAR & DONALD KINDER, NEWS THAT MATTERS 133 (1987).

187. For a survey of the social psychology research regarding the ability of the mass media, especially television, to socialize individuals and form attitudes, see 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 571-83 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985), and sources cited therein. See also IYENGAR & KINDER, *supra* note 186, at 133 (discussing mass media's ability to structure and develop ideas for popular culture); SHANTO IYENGAR, IS ANYONE RESPONSIBLE? (1991) (questioning whether the media accepts responsibility for the ideas it disseminates).

188. For a discussion of the role of television in eliminating discussions of policy issues during electoral campaigns, see JAMES FISHKIN, DEMOCRACY AND DELIBERATION 63 (1991); S. ROBERT LICHTER ET AL., THE VIDEO CAMPAIGN 12, 14-15 (1988); SUNSTEIN, *supra* note 89, at 59-61 (citing, among others, KATHLEEN HALL JAMIESON, DIRTY POLITICS 152-80 (1992)).

189. For example, to say or write that the best way to deal with violence is to respond with more violence does not seem to make a very convincing argument. Watching Clint Eastwood or Arnold Schwarzenegger doing so successfully, however, over and over again, surely does communicate some version of that idea, and with remarkable effectiveness. I would add that whether intended by the producers or not, there is unquestionably a strong political component to such portrayals of violence, if nothing else than as a challenge to the belief that the best solution to urban violence is gun control.

government, authority figures, and violence, and situation comedies have historically expressed quite strong views on appropriate family structure and the role of women in society. Again, these viewpoints may well be reprehensible, but they are unquestionably political.<sup>190</sup>

The basic conclusion to draw from the political nature of the media's cultural formation activities, perhaps counterintuitively, is that in regulating the mass media, one must tread lightly, because any choice to favor particular program content is, under the above analysis, an explicitly political choice. Therefore, unless one begins with a strong theoretical view as to the sort of society that is constitutionally or otherwise favored, and based on this view determines the limits that should be placed on the definition of what is "political" and on acceptable political outcomes,<sup>191</sup> such regulatory choices begin to appear as arbitrary, and potentially dangerous, interference with political expression.<sup>192</sup> Traditional First Amendment analysis and the Supreme Court's existing jurisprudence are oriented towards constraining government efforts to punish, or prevent, criticisms of itself.<sup>193</sup> The dangers of governmental interference, however, can be far more subtle and insidious than that. Influence over the mass media and the contents of popular culture provide a slower, but ultimately far more effective, tool for governments and governing majorities to squelch dissent and shape

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190. See, e.g., Fiss, *supra* note 142, at 1411 (stating that the Columbia Broadcasting System (CBS) has a viewpoint that is "real, pervasive, and communicated almost endlessly . . . [and] is not confined to the announced "Editorial Message," but extends to the broadcast of *Love Boat* as well. In the ordinary show or commercial a view of the world is projected, which in turn tends to define and order our options and choices.")

191. As the Critical Theorists did. See *id.* at 1412 & n.24 (using the specific example of Marcuse as a Critical Theorist who is able to avoid the difficult question of what speech belongs in "public debate" because of Marcuse's preexisting political ideology) (citing Herbert Marcuse, *Repressive Tolerance*, in *A CRITIQUE OF PURE TOLERANCE* 81 (1969)). My position is, of course, open to the general critique of pluralism, advanced by modern Critical Legal Studies theorists, that pluralism will simply permit those with power to retain dominance. See KELMAN, *supra* note 180, at 247-49. However, as the following discussion indicates, the response to this criticism seems to be that the use of the coercive powers of the *State* to tilt the debate is a cure more dangerous than the illness.

192. Cf. Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 49 (1983) (arguing that coercing silence is "particularly problematic," because such coercion prevents the creation of legal meaning and normative worlds). Professor Cover extends this reasoning to conclude that coercing actions can be almost as problematic as coercing speech, but that argument is beyond the scope of an Article on the First Amendment.

193. For discussions and critiques of the current focus of First Amendment law on government restrictions on speech, see SUNSTEIN, *supra* note 89, at 5, 34-48; Fiss, *supra* note 142, at 1408-10.

opinion in particular directions.<sup>194</sup> Absent clear and definable guidelines on what should constitute favored speech, permitting regulatory preferences for particular types of speech seems fraught with risk.<sup>195</sup>

It is here that my disagreement with Professor Sunstein becomes most evident. Because Sunstein starts with a strong, Madisonian view of what is political, he is able to dismiss most of popular culture, and in particular, most broadcast programming, as largely irrelevant to the purposes of the First Amendment.<sup>196</sup> Thus, he recommends that the FCC promote "high-quality programming, attention to public issues, and diversity of views."<sup>197</sup> This approach, however, incorporates a strong, and quite narrow, view of how political debate should proceed: that is, through reasoned, educated, and generally moderate discourse. This is certainly the format that television programming that is explicitly oriented towards politics tends to follow, but favoring such programming seems as much an act of political favoritism as the media's general habit of limiting significant coverage to major party candidates. Indeed, the two have much in common because they both narrow the range of political discourse.<sup>198</sup> Even if the problem of centrism can be avoided—which is unlikely—the inherent limitations placed on the permissible forms of discourse by this view of politics create a bias towards the mainstream.<sup>199</sup>

194. Congress' and the FCC's recent preoccupation with the regulation of "indecent speech" is surely an example of such attempts at homogenizing. See, e.g., S. 652, 104th Cong., 1st Sess. §§ 401 *et seq.* (1995) (limiting indecent speech over any "telecommunications device," including the Internet); see also *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 130-31 (1989) (striking down congressional restrictions on "dial-a-porn" services); *Action for Children's Television v. FCC* (ACT III), 58 F.3d 654, 669-70 (D.C. Cir. 1995) (en banc) (upholding FCC rules limiting indecent programming on television during certain hours). Also brought to mind are the recent statements by Senator and presidential candidate Bob Dole, criticizing certain rap music as "nightmares of depravity," but describing the Arnold Schwarzenegger movie "True Lies" as a "family film." See Bernard Weinraub, *Films and Recordings Threaten Nation's Character*, Dole Says, N.Y. TIMES, June 1, 1995, at A1.

195. For a similar critique of modern efforts to regulate mass media speech, see Thomas Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1727-30, 1741 (1995).

196. See SUNSTEIN, *supra* note 89, at 81-88.

197. *Id.* at 82.

198. For example, the view of politics underlying this description of political speech seems to leave little room for radicalism or nihilism in politics, forces that seem more prevalent in portions of popular culture than in the political mainstream.

199. In this context, it is interesting to note that one favored tool of both Professors Sunstein and Fiss in forcing coverage of political issues by the mass media is the FCC's "Fairness Doctrine," which creates an obligation on the part of broadcasters to give

The above discussion suggests a criticism of the must-carry rules and of the decision by the *Turner* Court to sustain those rules, based on the preference stated by Congress in those rules for "local" programming over national programming. In the 1992 Cable Act, Congress stated explicitly that it believed local programming had special value and should be preserved, even at the expense of national cable programming, because of its coverage of local issues.<sup>200</sup> The *Turner* majority accepted this as a legitimate objective of the must-carry rules,<sup>201</sup> even though the dissent pointed out that Congress' preference "for localism" was itself content-based and therefore presumptively impermissible under the Court's jurisprudence.<sup>202</sup> While the dissent's analysis proceeds too quickly, its particular conclusion in this regard seems quite correct. A preference for local broadcasting and community-based speakers incorporates, at least to some degree, a vision of the appropriate structure of society that is political at heart, and therefore suspect.

All of the above highlights the critical role of the mass media in shaping our culture and political landscape, and the dangers raised by governmental involvement in that shaping. This conclusion, in turn, strongly suggests that a theoretically grounded First Amendment policy should incorporate a strong bias against governmental preferences for particular speech, whether defined by topic, type, content, or viewpoint. The arguments raised in favor of governmental involvement,<sup>203</sup> which presume the ability to distinguish high-value political speech from other speech, are flawed because they define the political realm too narrowly and fail to take account of the profoundly

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adequate coverage to public issues, as well as a right of reply on political issues against broadcasters, and which the Court sustained in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). See SUNSTEIN, *supra* note 89, at 54-57; Fiss, *supra* note 142, at 1416, 1423. Stanley Ingber, however, has cataloged the misuse of the Fairness Doctrine by government and private entities to suppress disfavored viewpoints. See Ingber, *supra* note 179, at 57-65. In addition, it seems at least as likely that the Fairness Doctrine has discouraged coverage of obviously political issues by broadcasters as the idea that it has enhanced coverage. See, e.g., Fiss, *supra* note 142, at 1419-20. All of which suggests, again, the perils of regulatory attempts to favor particular speech. For a general discussion of the Fairness Doctrine, its history, and its recent vicissitudes, see Roland F. L. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 MERCER L. REV. 705, 708-14 (1994).

200. 1992 Cable Act §§ 2(a)(10), 2(a)(11), 47 U.S.C. §§ 521(a)(10), 521(a)(11).

201. *Turner Broadcasting*, 114 S. Ct. at 2469-70.

202. *Id.* at 2477; see also *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 58 (D.D.C. 1993) (Williams, J., dissenting) (noting that Congress' decision was at least partially content based), *vacated and remanded*, 114 S. Ct. 2445 (1994).

203. See *supra* notes 144-46, 172-77 and accompanying text.

political nature of the socialization process in which the mass media is engaged. This is not to say that the government has no role to play in this arena. The First Amendment unquestionably values diversity among speech and speakers, and an instrumental theory of the First Amendment should permit the government to promote such diversity. The question that remains is what regulatory approaches the government should adopt, and may permissibly adopt within the strictures of the First Amendment, to advance diversity. In formulating an answer, I now return to Justice Holmes's much-maligned "marketplace of ideas" metaphor.<sup>204</sup>

## 2. Structural Regulation and Content (In Defense of the Marketplace Metaphor)

As discussed earlier in this Article,<sup>205</sup> the current First Amendment jurisprudence of the Supreme Court is premised heavily upon the "marketplace of ideas" metaphor, as first articulated by Justice Holmes,<sup>206</sup> and later fleshed out by Justice Brennan.<sup>207</sup> In particular, the Court's efforts in this area exhibit a strong *laissez-faire* approach to speech markets, and are directed primarily toward protecting Professor Fiss's "street corner speaker."<sup>208</sup> In recent years, however, the marketplace metaphor has come under repeated, heavy academic attack, varying from the civic republican criticism that the metaphor discounts the value of deliberation,<sup>209</sup> to the view that the metaphor exaggerates the importance of discourse at the expense of individual autonomy,<sup>210</sup> to more radical attacks that deny the very rationalistic assumptions that underlie the metaphor.<sup>211</sup> One common feature of most of these criticisms is the claim that a "marketplace" approach to free speech makes speech a hostage to

204. See *supra* note 91 and accompanying text.

205. See discussion *supra* part I.C.

206. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

207. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

208. See *Sullivan*, *supra* note 92, at 950-51; *supra* note 143.

209. SUNSTEIN, *supra* note 89, at xviii, 24-28, 249.

210. E.g., C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181, 1183-85, 1198 (1994). Despite my disagreement with Professor Baker's emphasis on autonomy values in free speech theory, his concept of "cultural construction" and his criticism of the "rational discourse" model—which he believes is a premise of the marketplace metaphor—bear obvious parallels to my own views, as expressed earlier in this Article. See discussion *supra* part II.A.1. As the following discussion indicates, where I diverge from Professor Baker is in his assumption that a marketplace necessitates rationality. See *supra* note 180 and accompanying text.

211. E.g., Ingber, *supra* note 179, at 7.



wealth and skews debate in favor of those who can afford to pay.<sup>212</sup> These criticisms raise legitimate concerns. Nonetheless, I will argue that the attacks on the marketplace metaphor are ultimately misplaced, and that, especially with regard to the mass media, an approach to speech and speech regulation modelled on economic markets has many insights to offer for both regulatory and constitutional policy. Moreover, and contrary to most commentators, a market-based approach to free speech jurisprudence does not necessitate a *laissez-faire* policy, hostile to all market regulation, although it does impose constraints on acceptable regulatory strategies.

In formulating an approach to mass media regulation, I begin with two premises: First, because of the strong First Amendment interest in fostering diversity of both speech and speakers,<sup>213</sup> regulation must necessarily take into account the content of speech in the course of creating diversity; but second, because of the theoretical incoherence of any attempt to identify what is political, or otherwise constitutionally "preferred" speech, and because of the further danger that any systematic governmental favoritism between categories of speech will permit the State to gain undue influence over the social culture, regulation of the mass media must *not* favor or disfavor speech of any particular content or even general type. The danger of governmental control over the socialization process, in particular, is sufficiently great and subtle, that constitutional policy must maintain a wary mistrust of regulation that seems to skew, or even correct existing skews in, the speech playing field.

What emerges from these two principles is a strong preference for *structural* solutions to dysfunctions within media markets that might limit diversity or otherwise fail to produce a well-functioning, atomistic marketplace. This preference is sufficiently powerful and well-rooted in theoretical concerns about governmental and majoritarian misuse of regulatory power, that it should be constitutionalized and incorporated into the First Amendment analysis governing regulation of the mass media. A corollary to this proposition follows: The analysis, while favoring structural approaches, should strongly disfavor regulations or administrative mechanisms that require ongoing or case-by-case involvement by the State in selecting the speech to be delivered through media outlets.

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212. See SUNSTEIN, *supra* note 89, at 57-58; Fiss, *supra* note 142, at 1412-13; Ingber, *supra* note 179, at 36-40, 71-76; *The Message in the Medium*, *supra* note 20, at 1070-71.

213. See *supra* notes 164-71 and accompanying text.

Such governmental involvement is likely to provide far too many opportunities for systematic favoritism towards viewpoints and modes of speech within the social/cultural mainstream, and concomitantly, is likely to lead to censorship of dissenting social views.<sup>214</sup> Moreover, without a strong view of what the good society looks like, there is little theoretical justification for explicit governmental favoritism.

All of these considerations also point out why a market-based approach to regulation remains preferable to all others, and also why the marketplace metaphor has much to offer to constitutional analysis. Markets remain the best way we know of to make and allocate goods and services (or ideas, for especially in the media context these are not separable concepts); create and nurture a wide variety among suppliers (speakers), products (speech), and consumers (listeners); and maximize individual autonomy, all while keeping governmental involvement to a minimum. Thus, it seems only logical that the best way to achieve the constitutional goals of creating as wide-open a discourse as possible, while minimizing the risk of a skewing towards social conformity, would be to encourage free and diversified markets in speech.

This is also a response to the argument advanced by Professor Sunstein against excessive reliance on markets in speech policy, based on his belief that markets themselves reflect disguised governmental regulation in the form of the distribution of legal entitlements.<sup>215</sup> This may be so, but direct regulation to compensate for the distortions these entitlements cause is a cure that is worse than the disease. It can only increase favoritism and further distort the debate. Because competition and markets do a better job than any direct regulation in limiting private power, the better approach is to adopt regulations that encourage the development of competitive markets.<sup>216</sup>

214. Such censorship could take the form of favoring mainstream political views over more radical alternatives, or more subtly, by favoring speech that is defined as political, at the expense of more threatening attacks on the social structure. See *supra* note 196-99 and accompanying text. In light of these concerns, perhaps the most troubling sort of regulatory strategy would be one that systematically favored government funded or sponsored speech such as public television, yet such an approach is frequently espoused. See, e.g., Hawthorne & Price, *supra* note 33, at 510-13. Even Professor Sunstein's approach of "promoting high-quality programming," SUNSTEIN, *supra* note 89, at 82, carries the danger, it seems to me, of ensconcing the culture of the majority or the elite.

215. For an exposition of this argument in the specific context of media regulation, see generally Sunstein, *supra* note 163, at 145-60 (arguing that media regulation can achieve the desired goals).

216. For a similar view, see Krattenmaker & Powe, *supra* note 195, at 1734-37.

Furthermore, the concept of markets in speech has much to offer constitutional theory. Such a model, or metaphor, should suggest modes of analysis geared towards making speech markets more free, diverse, and effective. A constitutional analysis involving speech markets should take into account such explicit economic concepts as substitutability, product definition, supply, demand, and market concentration in assessing whether particular regulatory strategies are likely to further First Amendment policies. The Court's current doctrine, while purporting to be based upon a marketplace model, is in fact entirely devoid of any sophisticated analysis of how markets *really* work and how particular regulations or judicial decisions will affect those markets. Instead, the jurisprudence simply presumes the existence of an almost perfectly functioning market, an assumption that is both theoretically naive, and in the media context, counterfactual. A true market-oriented analysis can do better.

A first step in this direction is to recognize that the First Amendment need not be read automatically to disallow, or even discourage, regulation. That is, markets do not mandate a *laissez-faire* approval. It seems almost unnecessary to point out that even in unconcentrated, well-functioning markets in goods, there is no such thing as true *laissez-faire*. All marketplace activity relies on the existence of regulation and law, if for no other reason than to define the rules of the market, to protect against violent dispossession, and to enforce agreed-upon bargains.<sup>217</sup> Many markets present sound economic reasons for much more extensive regulation, including a need for disclosure rules,<sup>218</sup> prevention of anticompetitive conduct,<sup>219</sup> and direct regulation of production when competitive conditions simply will not exist.<sup>220</sup> What a market-oriented approach recommends is not hostility to all regulation, but a preference

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217. For a detailed exposition of these ideas, see SUNSTEIN, *THE PARTIAL CONSTITUTION*, *supra* note 157, at 50-54.

218. Examples include disclosures required in the course of issuance and sale of securities, and in the sale of food for human consumption. *See* Securities Act of 1933, ch. 38, §§ 5-10, 48 Stat. 74, 77-81 (current version at 15 U.S.C. §§ 77e-77j (1994)); Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, §§ 2(a), 3(a), 104 Stat. 2353, 2353-60 (current version at 21 U.S.C. §§ 343(q)-(r) (Supp. V 1993)); *see also* SUNSTEIN, *supra* note 89, at 33 (giving examples of disclosure requirements).

219. The primary example is the antitrust laws. *See* 15 U.S.C. §§ 1-20 (1994).

220. The most common form of such regulation involves public utilities, such as the telephone industry and the power industry. *See, e.g.*, 47 U.S.C. §§ 201-04 (1988 & Supp. V 1993); 16 U.S.C. §§ 824-25 (1988 & Supp. V 1993).

for particular kinds of regulation, based upon principles of regulatory economics.<sup>221</sup>

In speech markets, however, economic principles alone cannot answer the question of when and what kinds of regulation are appropriate. The First Amendment imposes independent policy considerations beyond the simple logic of efficiency. For example, there are numerous economic markets, including notably most modern consumer markets, where concentration among producers appears to be both efficient and unproblematic.<sup>222</sup> When the market is in speech, however, such concentration has significant political and cultural ramifications, that are most assuredly problematic. In other words, diversity in speech is desirable even when it may not be efficient. Similarly, direct regulation of production by the government (for example, of utilities) is clearly less troubling when the product at issue is not of constitutional concern (for example, electricity), as when such regulation might permit the government to control speech. Thus, when difficult free speech issues are presented, a simple economic or regulatory analysis is insufficient, and cannot replace a more complex constitutional theory.<sup>223</sup>

Nevertheless, when considering mass media regulation, an analytical focus on real markets, as opposed to the stylized construct of the Court's metaphor, is useful. When a statute or rule regulating the mass media is challenged under the First Amendment, a logical first question is whether the regulation is even necessary, that is, whether it is addressing a real problem. In answering that question, an examination through an (at least somewhat) economic lens of the speech market at issue would seem essential, because only economic analysis will indicate whether the market being regulated is suffering any significant failures. Any such regulation is also likely to burden at least some speech. Thus, the second question is how great of a burden the regulation imposes. Assessing how great that burden is,

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221. For general treatments of industrial organization theory, see F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (2d ed. 1980); JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* (1988).

222. For a brief summary and history of industrial concentration figures in the U.S. economy, see Phillip Areeda & Louis Kaplow, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 794-800* (4th ed. 1988).

223. *Contra* Bernstein, *supra* note 23, at 1684-85 (arguing against regulation of cable content because market forces will give cable operators proper incentives); Glenn B. Manishin, *An Antitrust Paradox for the 1990s: Revisiting the Role of the First Amendment in Cable Television*, 9 CARDOZO ARTS & ENT. L.J. 1, 14 (1990) (arguing that the First Amendment has no relevance to cable regulation, because the issues involved are ultimately ones of economic regulation only).

however, is under current law an entirely ad hoc analysis.<sup>224</sup> Here too, notions of substitutability and market definition can contribute to an understanding of whether the affected speakers and listeners have available effective alternatives to the burdened communication. The list goes on: Is the regulation likely to be effective? Has it focused on a definable market? Will it improve conditions within the market? These are all areas of concern where a market orientation can contribute significantly to analysis and should be part of the constitutional theory supporting that analysis.

A market-oriented theoretical approach also has some important, substantive implications. Most importantly, a market-based approach elevates individual preferences and choices above all other considerations.<sup>225</sup> Indeed, this seems the strongest reason to embrace the market—because it does not favor any particular world view. The market also has some negative implications, however. In particular, a market-based model does not, and cannot, guarantee an audience. Structural regulation can make it easier for individuals to have access to the market, either as speakers or consumers, and it can try to create conditions permitting speech to be produced and sold that might not command a very large audience,<sup>226</sup> but the basic need for an audience remains. If no one, or almost no one, has any interest in hearing particular speech, it is not likely to be produced in a marketplace, even if the speech might seem to have important contributions to make to debate. That, however, is the price of agnosticism. Also, there does exist at least one response to the no-demand problem: explicit government subsidies of unpopular speech.<sup>227</sup>

Subsidies may also be the answer to the other potential drawback of emphasizing market forces, which is that the right to speak, or listen, can become too closely tied to wealth and income distribution. Basing speech rights on the ability to pay, as markets tend to do, has the danger of skewing the production of speech in particular directions, probably again in favor of the *status quo*. For all of the

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224. See *supra* notes 131-34 and accompanying text.

225. See Krattenmaker & Powe, *supra* note 195, at 1731-33.

226. That is, regulation can seek to counteract the economies of scale that seem to exist in media markets. The reason one might want to do this is, of course, that the need for large audiences tends to enforce conformity and a move towards the center.

227. See *infra* part II.B.3. From the point of view of those who would favor explicitly political speech, moreover, recent experience suggests that lack of demand may not be a major cause of concern. The success of ventures such as CNN and C-SPAN suggests that substantial demand exists for political and public interest oriented speech.

reasons already discussed, however, explicit government action designed to silence some speakers for the benefit of others seems a particularly unattractive solution to this problem.<sup>228</sup> Subsidies, on the other hand, do not carry with them the same risks of the government dominating the process of cultural formation and are largely consistent with a purely structural approach to regulation.

In sum, First Amendment theory should retain, albeit in a somewhat modified form, a market-based model (or metaphor) of the role of speech in our society. The theory should further incorporate strong preferences for structural rather than command-and-control regulation of media markets, and against policies that favor particular speech, speakers, or categories of either. I will now turn to the implications of these principles for First Amendment doctrine and for mass media regulation in practice.

## *B. Implications for Cable Regulation*

### 1. Doctrinal Reform

In considering the real-world implications of an until now largely theoretical discussion, I begin with a reassessment of the Court's First Amendment doctrine. My objectives here are modest. I do not claim that my proposals provide an appropriate First Amendment analysis for all areas, and I am in fact dubious whether such an all-encompassing doctrine is possible (indeed, the Court's current difficulties may be traceable to its embracing a single analysis for all free speech cases). Instead, I limit myself to the area of mass media regulation, and my proposals are geared very specifically to the issues that come up in that area.<sup>229</sup> Within this relatively narrow but very important area, however, one can reach some fairly definite conclusions.

First, it seems quite clear that in the area of mass media regulation, the Court's current two-tier analysis, and in particular its "tier-one" examination of whether a particular regulation is "justified" with reference to regulated speech, is largely useless. As already discussed, almost all regulation of the mass media will, at some level

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228. See *supra* notes 191-95 and accompanying text. Professor Sunstein makes a similar point. See SUNSTEIN, *supra* note 89, at 178-79.

229. Though a precise definition of the mass media is perhaps impossible, when I use the term I generally mean the commercial dissemination of information and speech by large, corporate or institutional speakers, to substantial numbers of listeners/consumers. Obviously, the line between mass media regulation and other speech regulation is sometimes a hazy one, but in most cases characterization does not seem difficult.

of generality, be justified with reference to the content of speech, because such regulation is generally concerned with *speech*, not other issues, and speech is about content.<sup>230</sup> Thus, the interest in diversity is clearly about content, as are limitations on violence or indecency, and the granting of access or reply rights. To attempt to distinguish between such regulations based on whether or not they are justified with reference to content therefore seems both impossible and of limited value. This is not to say that considerations of content will play no part in constitutional analysis, but that its role will be more limited than its current, almost talismanic importance.

What is needed is a unitary, and far more focused, analysis that is keyed to a precise domain—mass media regulation. In such an analysis, a reviewing court must first ask certain critical questions. What interests does the challenged regulation serve, and what goals is the government pursuing? The greatest weakness of the Court's current analysis, especially its balancing component, is the complete absence of any limits upon permissible governmental interests justifying regulation of speech. This absence is a direct consequence of the necessarily *ad hoc* origins of the balancing test in areas where the government has *independent* reasons to regulate, such as conduct regulation or regulation of government property.<sup>231</sup> With mass media regulation, this is not acceptable, because the dangers of skewing posed by unconfined government regulation far exceed any possible gains. When the government is regulating private speech that takes place on private property, not every justification will suffice. While the police power (or in the case of Congress, the Commerce Clause) generally permits governments to pursue a broad range of interests through regulation, when the government is directly regulating private speech, the universe of legitimate interests that can justify such regulation should be much narrower.<sup>232</sup> Instead, the first requirement of a valid mass media regulation must be that it is addressed to a precise and identifiable dysfunction within the regulated market, that First Amendment policies suggest require a regulatory response. This requirement presumes, of course, that the

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230. See *supra* notes 102-08 and accompanying text.

231. See *supra* part I.B.2.

232. As discussed *supra* part I.B.2, this is what distinguishes direct regulations of speech, such as the must-carry rules at issue in *Turner*, from the contexts in which the *Ward/O'Brien* test originated. When the government is regulating conduct, or use of its own property, its general regulatory powers are in full play. When it is directly regulating private speech, however, the government should not be pursuing goals that are not speech-related.

government can specify an economic market that is in need of regulation. Therefore, when a mass media regulation is challenged, if the government cannot specify a precise economic dysfunction in an identifiable market that the regulation addresses, the courts should automatically strike down the regulation.

Once a legitimate regulatory purpose has been identified, the second threshold requirement of a unitary analysis must be that the challenged regulation enacts a reasonably effective, structural solution to the problem being addressed. For all of the reasons already discussed, it is essential that mass media regulation operate through the creation of neutral structures that seek to prevent the market dysfunction from recurring, rather than involving the government in the micro-management or ongoing supervision of speech or speakers. In particular, any regulatory approach that permits speech to trigger rewards, obligations, or penalties, such as the Fairness Doctrine,<sup>233</sup> rights of reply,<sup>234</sup> or general substantive coverage obligations,<sup>235</sup> should be immediately suspect; even in other instances, the constitutional analysis should contain a presumption against command-and-control approaches that entirely displace existing market structures. Rather, mass media regulation should seek to complement existing markets, and interfere with market mechanisms only when necessary to cure dysfunctions.<sup>236</sup>

Once the basic requirements of purpose and approach are met, the constitutional analysis must then proceed to consider the nature and extent of the burden on speech that the challenged regulation imposes. In this regard, the first threshold question a court must consider is whether the regulation has the effect of systematically favoring particular speech or a particular category of speech. An effects-based, rather than a purpose-based, analysis seems necessary

233. The Fairness Doctrine, when it was in existence, required broadcasters to adequately cover public issues and present opposing viewpoints. See Hall, *supra* note 199, at 705 n.1; *supra* note 199.

234. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

235. In theory, the Fairness Doctrine imposes an obligation on broadcasters to cover public issues; but in practice, this aspect of the Doctrine has been essentially unenforced. See Hall, *supra* note 199, at 705 n.1, 725 & n.136.

236. For example, regulation can seek to ease entry when barriers to entry exist, or it can regulate sales under conditions of ineradicable natural monopoly. For a pragmatic attack on command-and-control regulation, see SUNSTEIN, *supra* note 89, at 82-83. For a discussion of appropriate economic regulation for new communications technologies, see Krattenmaker & Powe, *supra* note 195, at 1734-39.



here<sup>237</sup> because of the great difficulty in identifying improper purposes, especially when those purposes may be hidden in cultural biases shared by reviewing judges.<sup>238</sup> This analysis will sometimes be quite difficult, because of the unexpected ways in which regulation can skew markets, but it is unavoidable.<sup>239</sup> If any systematic preferentialism is identified, the regulation should again be presumptively invalid.<sup>240</sup>

Another particularly difficult issue is the question of how to treat speaker-specific regulations. As discussed above, the recurring problem with which the Court has struggled in assessing speaker-based restrictions is under what circumstances such restrictions reflect a content preference.<sup>241</sup> No clear answer has emerged. In the area of mass media regulation, this question is particularly important because so much regulation *does* focus on particular speakers or classes of speakers as a consequence of supply-side market concentration and a consequent fear of anticompetitive conduct within the relevant markets.<sup>242</sup> Furthermore, challenged regulations often

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237. Cf. Sullivan, *supra* note 92, at 965 (endorsing the purpose-based approach and result in *Turner*).

238. Examples of cases in which courts have failed to find an improper purpose, despite seemingly clear legislative hostility to certain speech content, include *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (finding zoning restrictions on adult movie theaters content neutral); *United States v. O'Brien*, 391 U.S. 367, 385 (1968) (finding law banning burning of draft cards content neutral); *American Library Ass'n v. Reno*, 33 F.3d 78, 86 (D.C. Cir. 1994) (finding special obligations imposed on producers of sexually explicit materials content neutral), *cert. denied*, 115 S. Ct. 2610 (1995).

239. Even unexpected and unintended regulatory burdens on speech should be of concern because of the tendency of legislators to minimize the importance of, or ignore, burdens on unpopular speech or causes. An example of such an unexpected burden might be the alleged chilling effect of the Fairness Doctrine on political criticism. See *supra* note 199. For a similar approach to the problem of racially discriminatory legislation, see David Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 121-22.

240. I leave open the question of whether there should be a "safety valve," paralleling current strict scrutiny analysis, which would permit such regulation if the need is shown to be great enough. Also, all burdens on speech need not be categorized as unconstitutional preferentialism. Thus selective blocking technologies, such as the proposed "V-chip" currently under consideration in Congress, are probably better characterized as an unbundling requirement than as preferentialism, and may be upheld on that basis so long as the burden on regulated speech is not too heavy. See Harry Edwards & Michael Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1514-15, 1566 (1995).

241. See *supra* notes 112-16 and accompanying text.

242. Thus the must-carry rules, 1992 Cable Act §§ 4, 5, 47 U.S.C. §§ 534, 535, favor broadcasters at the expense of cable operators and independent cable programmers; the Fairness Doctrine discussed *supra* note 199, regulates broadcasters; the cable/telco cross-ownership rule, 1992 Cable Act § 11, 47 U.S.C. § 533(b), regulates telephone companies; and the right-of-reply statute struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), regulated newspapers.

place substantial burdens on the speech of regulated entities. A solution that seems in line with the principles described above is that speaker-based regulation should be upheld only when the regulated entities, or classes of entities, are identified on the basis of some neutral characteristic unrelated to their status as speakers. The choice to single out potential speakers must be justified in the same way as any other mass media regulation, that is, as a reasonably necessary response to an identified market dysfunction. Furthermore, it is again the effects of the challenged regulation rather than its motives that must matter, and the burden must be on the government to identify the neutral characteristics that justify regulation of the affected persons. When a regulated class is defined by what the members say, or by the particular type of speech with which the class is associated, the underlying regulation will thus be presumptively unconstitutional.<sup>243</sup> On the other hand, when the class is defined by some neutral criterion such as control over important physical resources, there is no such presumption. When the link between the statutory classification and speech is unclear, the burden must be on the government to justify its choice of a regulated class by identifying what non-speech characteristic shared by that class creates a need for regulation.<sup>244</sup>

Assuming that a regulation survives all the threshold requirements of constitutionality, so that it is directed at a legitimate regulatory goal, adopts a constitutionally acceptable regulatory approach, and does not favor particular speech or speakers, the question remains of how its constitutionality should then be assessed. Here, we necessarily must return to some assessment of burden and effectiveness. Ultimately, there is no escaping some consideration by

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243. Under this approach, any attempt to shape debate by favoring some speakers over others—for example by restricting corporate speech or the speech of the wealthy—will be presumptively unconstitutional, since such laws necessarily identify disfavored classes based on what the government believes they will say. See *Buckley v. Valeo*, 424 U.S. 1, 58-59 (per curiam), *motion to extend stay granted*, 424 U.S. 936 (1976); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86 (1978). The danger that such purportedly speaker-based regulation masks content preference is simply too great to be tolerated. Cf. SUNSTEIN, *supra* note 89, at 238-39 (discussing a similar view).

244. This is not to say that no hard cases would remain. For example, the taxation scheme upheld in *Leathers v. Medlock*, 499 U.S. 439, 453 (1991), which applied a general state sales tax to cable operators but not to competing satellite broadcast services or the print media, *id.* at 442-43, remains difficult to classify. My guess, however, is that the case should probably have been decided differently, because there does not seem to be any non-speech related reason to single out cable operators among media entities. If, however, the state had chosen not to exempt *any* media speakers, the tax would almost certainly be constitutional.

a reviewing court of these matters, unless one were to adopt a *per se* rule of constitutionality, which would seem inconsistent with the speech-protective values of the Constitution. The analysis necessary at this stage, however, will be a great deal more focused than the *ad hoc* balancing of the Court's current *Ward/O'Brien* analysis.<sup>245</sup> Indeed, the primary task courts face in these cases will be relatively straightforward—assessing how effectively the regulation achieves the identified regulatory goal, and whether it unnecessarily burdens speech. Thus, the courts will not be balancing utterly disparate values. In fact, the analysis at this stage will depend entirely on the availability of alternative regulatory strategies, because, if a challenged regulation represents the most effective and least burdensome approach to a problem, it should almost certainly be upheld. Thus, the issue really comes down to whether the regulating body has ignored some other regulatory solution that is constitutionally preferable—meaning that it is substantially less burdensome and yet similarly effective. In this regard, I would place the burden on the party challenging the statute or regulation to prove that a clearly superior alternative exists. If no such alternative is identified, the reviewing court should uphold the regulation regardless of burden or balancing.

If, however, the First Amendment plaintiff does identify alternative and structural regulatory approaches to the identified problem, the reviewing court must then engage in a relative assessment of their burdensomeness and effectiveness.<sup>246</sup> The first step would be to determine the relative burdens on speech that each of the alternative strategies imposes. In other words, the court must decide to what extent each regulation makes speech significantly more difficult or expensive, either to produce or receive, and whether it leaves open adequate substitutes. Because we are dealing with markets, both inquiries are basically economic, though free speech values also play a role. The question of substitutes, in particular, should be closely tied to economic notions of what constitute substitute products, and not the current fiction that "all speech is equal." At the least, it seems plain that different mediums are generally not substitutes. Thus, if a video outlet is eliminated in a particular locality or for a particular speaker, it is no response to say that the same message can

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245. See *supra* part I.B.2.

246. For examples of such analysis, see *Turner Broadcasting*, 114 S. Ct. at 2479-80; *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505, 1510 n.13 (1993); *US West, Inc. v. United States*, 48 F.3d 1092, 1105 (9th Cir. 1994).

be conveyed in a newspaper or book. Indeed, even within a medium, substitution issues may exist.<sup>247</sup>

Furthermore, significant differences in cost, either for production, for distribution, or to the consumer, would indicate that an alternative mode of speech is not a true substitute. Again, the analysis, to have any meaning, must focus on the realities of the relevant market or markets, not on the abstract question of whether "ample alternative channels for communication" exist.<sup>248</sup> Finally, when assessing how burdensome a regulation is, the nature of the medium, the market, and the regulatory approach must be taken into account. For example, some have argued that interfering with the editorial discretion of cable operators is less burdensome than interfering with the editorial discretion of newspaper editors, because consumers do not identify cable operators with the speech provided over cable systems in the same way that newspapers are associated with the speech they print.<sup>249</sup> Such a claim, if empirically verified, would certainly be relevant to a constitutional analysis of rules, such as must-carry, which impose carriage obligations on cable operators.

Taking these principles into account, a challenging party must be able to demonstrate the existence of an alternative regulatory strategy that is significantly less burdensome on speech. Assuming this is possible, the challenger must also prove that the alternative strategy would effectively address the existing market dysfunction. Again, in assessing these arguments the reviewing court must take into account both economic principles and First Amendment values. The predictive judgments necessary here are somewhat difficult, and it is probably advisable for courts to defer to the political branches in case of doubt.<sup>250</sup> Nonetheless, the scrutiny even at this final stage is not

247. For example, consider the difference between a prime-time slot and a 3 A.M. slot on television.

248. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

249. *See, e.g., Brenner, supra* note 4, at 339; *Cowles, supra* note 37, at 1265-69.

250. The difficulty here relates to judicial competence and the issue of deference to legislative judgments. While the threshold requirements of constitutionality outlined above seem well within the competence of the judiciary, the analysis required at the last stage, requiring as it does a comparative assessment of regulatory policies, is more difficult. The choices concerning economic regulation are generally considered to be primarily for the legislature, and indeed, it is in the area of economic regulation that judicial deference to legislative judgments tends to be at its greatest. *See, e.g., FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-03 (1993); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-88 (1955). Nonetheless, when the regulation being challenged involves speech, and particularly the mass media, substantial deference seems inappropriate given the central role the courts play in defending free speech rights, and given that many of the dangers to be guarded against in this area involve majoritarian abuse of power. The solution as

completely toothless, since in at least some instances superior regulatory approaches will exist; but it is plainly the threshold requirements relating to purpose, structure, and neutrality that provide the primary protection to speech in the above-described analysis.

## 2. Some Reassessments and Proposals

In the previous section, I set forth the major outlines of a constitutional doctrine appropriate for First Amendment review of mass media regulation. I now turn to the implications of this analysis for the must-carry rules and for cable regulation in general.

The analysis outlined above strongly suggests that the Supreme Court decided *Turner* incorrectly by upholding the 1992 Cable Act's must-carry rules as at least potentially constitutional.<sup>251</sup> My analysis suggests a number of constitutional problems with must-carry. Most importantly, the rules are not neutral among different categories of speech. As Justice O'Connor's *Turner* dissent, as well as Judge Williams's dissent in the District Court, point out, the must-carry rules are designed systematically to favor speech of a particular content. That is, the rules favor speech that is "local" in origin and give disproportionate coverage to local issues and points of view.<sup>252</sup> Justice O'Connor's argument seems irrefutable on this point and is sufficient to condemn the must-carry rules as vehicles for an impermissible political preference on the part of Congress.<sup>253</sup> This is true even though, contrary to Justice O'Connor's dissent, the broader goal to which the rules are directed—increasing the diversity of speakers on cable television<sup>254</sup>—is perfectly legitimate. However admirable the goal, the means chosen by Congress in sections four and five of the 1992 Cable Act do not pass constitutional muster. Rather than creating structural mechanisms to address the competitive problems that Congress found in the cable industry, the rules interfere directly with market choices by coercing the carriage, and therefore the consumption, of particular speech.

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to the correct degree of deference is, however, not obvious, and a full consideration of these issues is beyond the scope of this Article.

251. See *supra* notes 68-80 and accompanying text.

252. *Turner Broadcasting*, 114 S. Ct. at 2476 (O'Connor, J., concurring in part and dissenting in part); *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 58 (D.D.C. 1993) (Williams, J., dissenting), *vacated and remanded*, 114 S. Ct. 2445 (1994).

253. See *supra* part II.A.1.

254. See 1992 Cable Act § 2(a)(6), 47 U.S.C. § 521; *Turner Broadcasting*, 114 S. Ct. at 2469-70.

In fact, the must-carry rules should have been struck down even if there had been no indication that the speech favored by the rules contained systematically different content than the disfavored speech, though that would be a closer case. The reason for this conclusion is that regulatory means existed to achieve Congress' ultimate end of preserving low-income access to video programming that are less burdensome on speech and that interfere less with market mechanisms than must-carry. There may be many such mechanisms, of course, but the most obvious are direct subsidies, either to encourage broadcasters to stay on the air, or to low-income or high-cost consumers to permit them to subscribe to cable.<sup>255</sup> Such a strategy is obviously less burdensome on speech and yet seems equally or more effective in preserving long-term access to programming. Indeed, subsidies generally have the virtue of burdening almost no speech, while directly advancing their intended ends. For these reasons, the must-carry rules would fail constitutional scrutiny under a burden/effectiveness analysis, as well as under the threshold rules forbidding favoritism.<sup>256</sup>

On the other hand, my analysis suggests that the cable/telco cross-ownership provision of § 533(b)<sup>257</sup> probably should be held constitutional, and therefore that the judicial decisions striking down the rule are wrongly decided.<sup>258</sup> In passing the cross-ownership

255. Lest there be some objection that cable service is not the sort of "essential" service that should be subsidized, I would point out that as a society we have heavily subsidized access to telephone services, and the role of cable in our social and political system today seems at least as important as the telephone—even before video services become truly interactive. Of course, subsidies raise issues of control over the public fisc, but as I will discuss, there are ways to cross-subsidize the receipt of network services such as cable that have little or no direct budgetary impact.

256. Contrary to arguments presented in *Turner*, see 114 S. Ct. at 2466-69, however, the must-carry rules are not impermissibly speaker-based. Even though the must-carry rules impose burdens on a class of speakers (cable programmers) and grant concomitant benefits to another class of speakers (broadcasters) it is not true that the regulated classes are identifiable only by the nature of their speech. Rather, Congress appears to have relied upon a neutral criteria in choosing to favor broadcasters—their mode of transmission. In particular, Congress favored broadcasters because their transmission structure provides speech without charge to consumers. See 1992 Cable Act § 2(a)(12), 47 U.S.C. § 521; *Turner Broadcasting*, 114 S. Ct. at 2469-70. This seems a speech-neutral criteria associated with a legitimate regulatory goal—subsidizing the consumption of speech by those who cannot afford to pay cable fees.

257. 1984 Cable Act, Pub. L. No. 98-549, sec. 2, § 613, 98 Stat. 2779, 2785 (codified as amended at 47 U.S.C. § 533(b) (Supp. V 1993)).

258. *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 203 (4th Cir. 1994), *aff'g* 830 F. Supp. 909 (E.D. Va. 1993), *cert. granted*, 115 S. Ct. 2608 (1995); *US West v. United States*, 48 F.3d 1092, 1106 (9th Cir. 1994); *Southern New England Tel. Co. v.*

prohibition, Congress identified what appears to be a legitimate competitive problem it was seeking to address—the possible misuse by telcos of their already existing wireline monopoly to gain control over cable, and the resulting threat that a single entity might end up with control over all wired access to the home.<sup>259</sup> In addition, § 533(b) is a structural regulation that addresses a potential market dysfunction while minimizing ongoing regulatory supervision. Furthermore, § 533(b) quite clearly is not designed systematically to favor or disfavor any particular speech. The statute prohibits participation only by a particular class of entities, local telephone companies, in the very specific economic market of video programming, and applies only within the telcos' service areas.<sup>260</sup> Despite its seemingly content-based language,<sup>261</sup> moreover, the statute does not favor any particular speech; rather, it regulates a particular product market. Finally, the burdened regulatory class is identified not because of its speech, but based on a thoroughly neutral criteria—the class members' status as monopoly providers of local telephone service.<sup>262</sup>

Thus, the cable/telco ban appears at least facially unproblematic. The analysis is complicated, however, by historical developments and technological changes since the passage of the cross-ownership bar, which have arguably rendered § 533(b) outmoded. It has been argued that the enormous growth of cable over the past ten years makes any threat of anticompetitive conduct illusory, and that modern technology permits telcos to provide consumers video services over their own existing lines that would *compete* with existing cable operators, thereby ameliorating rather than creating market dysfunctions.<sup>263</sup> Thus, Congress has no legitimate remaining interest in preventing telco entry into this market. It has also been argued that § 533(b) is

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United States, 886 F. Supp. 211, 219-20 (D. Conn. 1995); *Ameritech Corp. v. United States*, 867 F. Supp. 721, 737 (N.D. Ill. 1994); *BellSouth v. United States*, 868 F. Supp. 1335, 1344 (N.D. Ala. 1994).

259. See H.R. REP. NO. 934, 98th Cong., 2d Sess. 55 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4692; Video Dialtone Order, *supra* note 10, 7 F.C.C.R. at 5781, 5848; *Chesapeake & Potomac Tel. Co.*, 42 F.3d at 195.

260. 47 U.S.C. § 533(b).

261. The apparently content-based distinction occurs in the statute's definition of video programming. See *supra* note 43.

262. See Video Dialtone Order, *supra* note 10, 322.

263. See Video Dialtone Order, *supra* note 10, 5841-43 (summarizing comments to this effect submitted to the FCC); *id.* at 5848-50 (FCC reaching the same conclusion).

overbroad because numerous, less burdensome regulatory strategies exist to achieve Congress' ends, assuming that they are legitimate.<sup>264</sup>

These arguments are not trivial and provide substantial support for the decisions striking down the cross-ownership ban.<sup>265</sup> The difficulty with them is that substantial uncertainty remains, which the telcos have not been able to dispel, regarding the factual predicates of their obsolescence argument. There is uncertainty especially over the economic feasibility of telcos providing video over their existing networks, and the effectiveness of alternative regulatory approaches that would permit telco entry. Therefore, because telcos bear the burden of establishing the unconstitutionality of a facially valid statute, it seems preferable that, at least for the present, courts defer to Congress and the FCC, rather than enter into the fray at a constitutional level. This conclusion does not preclude the possibility that if after some time Congress fails to act, and the factual situation becomes clearer, the courts may be forced to reexamine § 533(b).

Until now, I have discussed familiar, previously tested regulatory schemes. There are, however, other approaches to cable regulation that have been proposed or implemented in recent years and that also require some discussion. Probably the most controversial set of proposals involve imposing common carrier obligations, based on the model of current telephone service, on cable operators.<sup>266</sup> Such a system would require cable operators to carry programming by anyone who requested carriage, on a first-come, first-served basis, and charge only non-discriminatory prices.<sup>267</sup> Two questions arise when considering such a proposal. Is it constitutional, and is it sound regulatory policy? Under my approach, the two questions are

264. See *Chesapeake & Potomac Tel. Co.*, 42 F.3d at 200-02; *US West*, 48 F.3d at 1104-06.

265. Indeed, it would seem that any congressional policy that seeks to enhance competition in relevant markets, for example by encouraging the development of alternative transmission networks, should be presumptively constitutional, while any policy that inhibits competition should be presumptively unconstitutional, absent a strong justification.

266. For examples of such proposals, see Carter, *supra* note 186, at 597 (describing a partial common-carrier model proposed by Ithiel de Sola Pool); Olcott, *supra* note 29, at 1593 (proposing a statutory solution based on a video common carrier structure, employing a programming subsidiary requirement); *The Message in the Medium*, *supra* note 20, at 1090 (proposing that operators treated as common carriers make transmission services available to the public on a nondiscriminatory basis, thus exercising fewer editorial discretions than today's media operators).

267. See, e.g., Communications Act of 1934, 47 U.S.C. §§ 201-203 (1988 & Supp. V 1993) (describing current obligations of telecommunications common carriers); Olcott, *supra* note 29, at 1593-1604 (describing proposed common carrier rules).



necessarily interrelated.<sup>268</sup> As to constitutionality, the primary problem posed by a common carrier obligation is the burden it would place upon the editorial discretion of cable operators to choose what programming to carry—indeed, a common carrier regime would eliminate any such editorial discretion. This, however, is a burden issue, not a threshold problem. A common carrier regime, by definition, does not favor any particular speech or speakers and does not involve the government in directing the production or consumption of speech-products. And while such a statute would impose special burdens on persons who control video transmission facilities, this is a regulated class that is identified not on the basis of speech, but because of members' control over particular, physical facilities. Finally, the regulatory goals of a common carrier statute are entirely legitimate, since the primary purpose of common carrier regimes is to eliminate the discrimination and anticompetitive conduct that can arise when a monopoly exists over some essential facility (here, transmission capacity). A common carrier statute is indeed an almost archetypal example of a structural solution to an existing market dysfunction.

The burden/effectiveness analysis, however, is more complicated. On the one hand, the burden that a common carrier statute imposes does not seem terribly great. While it is true that such a regime severely limits the editorial discretion of cable operators, for reasons discussed above,<sup>269</sup> that is not in itself terribly troublesome. Given the peculiar technological characteristics of cable, it seems unlikely that cable operators themselves feel a strong association with programming they choose to carry,<sup>270</sup> and it seems equally unlikely that consumers tend to identify the operator with carried programming.

On the other hand, it is not clear that a common carrier regime is a particularly effective solution to the competitive problems in the cable industry, suggesting that constitutionally preferable approaches may exist. Because of the limited capacity of cable systems,<sup>271</sup> it is

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268. For the purpose of this discussion, I assume that there is no bar to the cable operator owning or controlling some of the carried programming, so long as it does not discriminate in favor of its own programming.

269. See *supra* note 249.

270. This is because most operators are not even aware of the specific programming being carried at a particular time. See Brenner, *supra* note 4, at 380-81.

271. See *supra* note 21. These capacity limits seem likely to persist for at least the near future, despite the widespread rhetoric regarding the brave new world of 500-channel capacity. See Olcott, *supra* note 29, at 1569-70; Eugene Volokh, *Cheap Speech and What*

impossible to grant carriage to all who request it.<sup>272</sup> Some allocation mechanism is therefore necessary. What is most commonly proposed is a first-come, first-served regime, but such a system would be difficult to enforce. In particular, if an operator has an incentive to discriminate in favor of affiliated programmers, surely it will seek to bypass the rule by ensuring that such programmers are first in line. Also, enforcement of nondiscrimination rules requires exactly the sort of ongoing and probably quixotic governmental involvement that should be disfavored in mass media regulation.<sup>273</sup> Thus, a court assessing such a scheme would face the unusual situation of a statute that imposes relatively minor burdens on speech, but is perhaps not terribly effective. In this situation, the lack of a substantial burden, and the difficulty of identifying clearly superior regulatory strategies that are less burdensome, are sufficient to counsel a finding of constitutionality, especially when one considers the preference for deferring to the policy judgment of the elected branches. One related point: The current regulatory regime already incorporates a version of common carrier regulation in its leased access requirements.<sup>274</sup> Leased access, however, imposes a lesser burden on cable operators, since it leaves operators with control over some of their capacity. As such, if common carrier regimes are constitutional, leased access is *a fortiori* constitutional.<sup>275</sup>

A regulatory approach closely related to the common carrier propositions described above, and one that is in fact in consideration both in Congress and the FCC, is to impose restrictions on vertical integration within the cable industry by prohibiting or restricting

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*It Will Do*, 104 YALE L.J. 1805, 1831 (1995).

272. This is in contrast to the telephone system, where capacity does not significantly limit access.

273. Of course, even absent the capacity problem, any common carrier regime necessitates some ongoing official supervision in setting rates and ensuring that rates actually charged are nondiscriminatory.

274. 1992 Cable Act §§ 9, 10(a)-(b), 47 U.S.C. § 532.

275. Another drawback of a common carrier scheme is that it may not accurately reflect the financial structure of the cable industry. For reasons already discussed, the cable industry today is organized so that cable operators pay for access to programming and then pass on the charges to consumers as subscription fees. *See supra* notes 16-17 and accompanying text. There is no direct mechanism for programmers to bill consumers, and it is not clear that a workable billing mechanism could be easily created. Brenner, *supra* note 4, at 382, makes this point in reference to leased access. The common carrier, however, might be required to provide billing services as part of its transmission service, so this problem is probably not insurmountable.

affiliations between cable operators and programmers.<sup>276</sup> Such restrictions could either be imposed in conjunction with common carrier regulation, or on their own. As a preliminary matter, restrictions on vertical integration do not appear to run afoul of any of the threshold requirements I have set forth, for much the same reasons that common carrier regulation does not.<sup>277</sup> The regulatory interest that a vertical integration bar would serve—preventing discrimination in favor of affiliated programmers by those controlling transmission—is an extremely strong one. This is so because such discrimination appears to be a persistent competitive problem, which is permitted by cable operators' control over essential transmission facilities, and which creates a substantial barrier to a well-functioning market between programmers and consumers.<sup>278</sup> Vertical integration restraints are also, like a common carrier regime, structural regulations that do not target any particular speech. Finally, while the speech of a particular class of entities is burdened, as with common carrier regulation that class—those controlling transmission facilities—is neutrally defined.<sup>279</sup>

The burden that a ban on vertical integration would impose on the regulated class is, however, quite severe, since it would entirely prevent cable operators from speaking over their own systems. Furthermore, since at present such facilities are almost all monopolies, and because there are no true substitutes for the video medium, a total ban would leave no equivalent means for cable operators to speak, at least to their subscribers.<sup>280</sup> On the other hand, effective

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276. See 1992 Cable Act § 11(c), 47 U.S.C. § 533(f)(1)(C) (requiring the FCC to consider limiting vertical integration); Horizontal and Vertical Ownership Limits, *supra* note 62, at 8607-08 (declining for the present to adopt such restrictions).

277. See *supra* notes 266-68 and accompanying text.

278. A related argument that is made in favor of vertical integration restrictions is that cable operators can use control over programming to foreclose competition in transmission, by denying access to necessary programming. See 1992 Cable Act § 2(a)(5), 47 U.S.C. § 521 (congressional finding that this is a concern); *Id.* § 19, 47 U.S.C. § 548 (mandating FCC regulations to combat such abuses by programmers affiliated with cable operators). This argument, however, rests on the unproven (and facially unlikely) proposition that significant entry barriers exist in the programming market so that access to some particular programming is essential to creating a successful competitor to a cable operator. Absent evidence that this is true, the foreclosure argument does not seem to provide additional support for a vertical integration ban.

279. Restrictions on vertical integration do not burden the speech of programmers because the activity in which they are forbidden to engage, transmission, is not in any meaningful sense speech.

280. Broadcasting is not necessarily an option, because a separate cross-ownership provision makes it unlawful for persons owning broadcast station licenses to become cable operators, if the broadcast area of the station covers any portion of the community served

regulatory alternatives are not immediately apparent, since the historical experience<sup>281</sup> shows that antidiscrimination rules are difficult to enforce when an incentive to discriminate on the part of the owner of an essential facility remains in place. The government does, however, appear to have at least one regulatory alternative that is substantially less burdensome than a flat ban on vertical integration: It might restrict a cable operator's carriage of affiliated programming to a specified percentage of its channel capacity at any one time.<sup>282</sup> Such a strategy would seem to achieve most of the objectives of a flat ban without imposing nearly as severe a burden on the cable operator's speech. For these reasons, a flat ban on vertical integration should probably be struck down, while a reasonable restriction on how much affiliated programming an operator is permitted to carry would quite clearly be constitutional.

Finally, I come to the issue of subsidies, government-financing, and direct governmental involvement in media marketplaces. One of the persistent criticisms of the current, market-driven approach to free speech rights is that markets favor the speech and listening rights of the wealthy, thereby skewing public debate.<sup>283</sup> Most proposed solutions, however, involve the squelching of some speech, or speakers, in order to permit favored speakers to be heard; but for reasons already discussed, the dangers of censorship and ideological preferentialism raised by such approaches seem to far exceed the gains.<sup>284</sup> A better solution, and one that, in my view, should be constitutionally preferred, is to subsidize those perceived to be slighted by the marketplace. On the demand side, the most obvious way to do this is to subsidize the access of low-income people to speech markets, most obviously in the cable context, by subsidizing

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by the operator's cable system. See 1984 Cable Act § 2, 47 U.S.C. § 533(a)(1).

281. I refer to the telephone industry, and in particular to the events leading up to the breakup of the Bell System, when MCI and other long distance carriers complained that AT&T and the Bell System used their control over essential local networks to discriminate in favor of their own long distance service. See generally *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 160-63 (D.D.C. 1982) (summarizing evidence that AT&T had monopolized the telecommunications market in violation of the Sherman Antitrust Act), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

282. The FCC has in fact adopted such a restriction, on the instructions of Congress in the 1992 Cable Act. Under current rules, a cable operator may occupy only 40% of its channels with video programming produced by a programmer affiliated with the cable operator. See *Horizontal and Vertical Ownership Limits*, *supra* note 62, at 8583-96.

283. See *supra* note 212 and accompanying text.

284. See *supra* notes 191-95, 213-14 and accompanying text.

subscription charges.<sup>285</sup> Such a policy is likely to strengthen the demand for diversified programming and therefore produce more diverse speech through market mechanisms, all without the need for any explicit preferentialism by the government. The only question that arises is whether these subsidies should be financed out of general revenues, or through charges imposed on wealthier consumers.<sup>286</sup> The first is probably preferable, since it is more neutral in its application and does not burden listeners as such; but even a more explicit cross-subsidizing approach would probably be acceptable, so long as the financial burden imposed on individual consumers is slight.

### 3. The Difficult Case of Government-Funded Speech

The other form of subsidy available to the government is on the supply side, through funding the production of programming in order to increase diversity, or to favor particular ideological positions. While facially similar to consumption-side subsidies, government funding of speech raises far more difficult constitutional and policy questions, and therefore requires more extended treatment here.

The first funding strategy that the government could adopt would be to provide funding<sup>287</sup> to anyone creating new video programming, regardless of the content of the programming. If funding were limited, it would be distributed on some neutral basis, such as a first-come, first-served scheme.<sup>288</sup> The purpose of such a policy would be to permit the creation of programming that might not have a large commercial market—perhaps because those who would wish to view such programming are few or poor—and thereby increase diversity

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285. The availability of this regulatory strategy is of course one of the reasons why I conclude that the must-carry rules should be found unconstitutional.

286. Or equivalently, one could require cable operators to set up rate structures that cross-subsidize among consumers, much as is done with local telephone service.

287. Or alternatively, the government could provide tax breaks. Cf. *Regan v. Taxation With Representation*, 461 U.S. 540, 549-51 (1983) (holding that § 501(c)(3) of The Internal Revenue Code, which grants a tax exemption only to certain nonprofit organizations "no substantial part of the activities of which" engages in lobbying or attempts to influence legislation, neither violates the First or Fifth Amendments nor regulates any First Amendment activity).

288. Professor Carter has advanced a somewhat similar idea in proposing that the government itself establish (1) a broadcast or cable network with independent editorial discretion and (2) common carrier broadcast and cable stations on which programming slots would be distributed by lottery. Carter, *supra* note 186, at 606. The latter approach strikes me as a viable solution, but the former does not—I am dubious about the ability of a publicly-owned network to be insulated from political pressure to stick to the ideological and cultural mainstream.

within the supply of available programming. Any such funding policy seems entirely unproblematic constitutionally, since it does not directly burden any speech or speakers, nor does it favor any particular type of speech, and seems otherwise highly desirable. Unfortunately, if recent experience with arts funding is any indicator,<sup>289</sup> the ability of the government to maintain neutrality within such a program is doubtful, especially when the funded programs begin to challenge widely accepted moral beliefs or important cultural shibboleths. Of course, such programming is just the sort that is likely to be in need of independent funding, since it is unlikely to create much market demand.

Another issue is the permissibility of government funding that is *not* neutral, and that limits its support, on a systematic basis, to particular, favored content or viewpoints. Selective funding of speech by the government remains a topic of ongoing controversy on which views vary sharply, and sometimes unpredictably.<sup>290</sup> On the one hand, it has been plausibly argued that selective funding is not only permissible, but is positively desirable as a means to "enrich public debate" through the funding of public-oriented or high-quality speech.<sup>291</sup> In fact, the current funding of public television and radio by the Corporation for Public Broadcasting is probably best viewed

289. I refer to the recent efforts to eliminate federal funding for the National Endowment for the Arts (NEA), which seems to have been based at least in part on hostility to the contents of the speech funded by the NEA. See SUNSTEIN, *THE PARTIAL CONSTITUTION*, *supra* note 157, at 308-13. Jacqueline Trescott, *House Vote Set to Abolish Arts Endowment*, WASHINGTON POST, July 18, 1995, at C1.

290. The current constitutional status of selective funding is far from clear. The constitutionality of content and viewpoint discrimination in funding seemed clearly established in the wake of the Supreme Court's decision in *Rust v. Sullivan*, 111 S. Ct. 1759, 1764 (1991), in which the Court upheld the so-called "gag rule" prohibiting clinics from using federal funds to provide abortion-related services including medical advice. More recently, however, in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2518-20 (1995), the Court struck down what it found to be a viewpoint-based restriction on the funding of student publications by the University of Virginia, while acknowledging that content-based restrictions may be permissible. The Court purported to distinguish *Rust* on the grounds that *Rust* involved the government's own speech rather than a government program to fund private speech. *Rosenberger*, 115 S. Ct. at 2518-19. Thus, the government had the right to control its own speech, but not the private speech of individuals who received government funding. I am doubtful, however, whether the two situations are so easily distinguishable. See *id.* at 2548 nn.11-12 (Souter, J., dissenting) (recognizing the difficulty of distinguishing between government-funded, but private, speech and the government's own speech spoken by private individuals whom the government pays specifically to do so, and leaving open the question of constitutionality of viewpoint-based discrimination in government funding).

291. See, e.g., SUNSTEIN, *supra* note 89, at 84, 88; Fiss, *supra* note 142, at 1415.

as just such an effort.<sup>292</sup> On the other hand, selective funding has also been widely and sharply attacked.<sup>293</sup> In particular, Professor Sunstein has argued that permitting unconstrained viewpoint discrimination in funding decisions is extremely problematic because of its skewing effect on the public debate, and that therefore such discrimination should be permitted only as part of discrete and limited programs, and only so long as the discrimination does not involve taking sides in current political debates.<sup>294</sup>

The above analysis suggests, however, that discriminatory funding, while perhaps not particularly desirable, is not unconstitutional, and is also largely unavoidable.<sup>295</sup> An approach to speech issues that continues to place great reliance on market forces suggests that one can draw a distinction between the government as regulator and the government as market participant, and that actions taken in the latter role generally provide less cause for concern, since

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292. Despite the purported independence of public broadcasting, it seems plain that public broadcasting is intended to provide programming with a very particular view of culture and politics—one that is moderate and traditional. The cultural programming tends to be favored by the elite and the political coverage tends to be informed and thoughtful, but rarely radical. See Walter Goodman, *If PBS and Newt Gingrich Go Head to Head*, N.Y. TIMES, Dec. 19, 1994, at C11. None of this is necessarily bad, but public broadcasting does contain strong and predictable content-based biases and is in no way an outlet for speech outside the mainstream.

293. See, e.g., Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2055 n.212 (1994) (criticizing the Court in *Rust* for treating government funding of private speech in abortion clinics as government speech, and arguing, by analogy to the Court's public forum doctrine, that viewpoint discrimination in government funding should be unconstitutional).

294. SUNSTEIN, *supra* note 89, at 114-18, 226-34; SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 157, at 308-15. Interestingly, however, Professor Sunstein does not appear to believe that public broadcasting violates this principle; probably because his definition of what constitutes viewpoint discrimination seems narrower than mine. See SUNSTEIN, *supra* note 89, at 231-32.

295. Obviously, this conclusion is in some tension with the Court's recent decision in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2518-20 (1995). As already discussed, however, I have some doubts about whether *Rosenberger* is consistent with existing law, including especially the *Rust* decision. See *supra* note 290. Moreover, the result in *Rosenberger* may be explained by the nature of the speech that the University of Virginia refused to fund, which consisted entirely of publications that "primarily promot[e] or manif[est] a particular belie[f] in or about a deity or an ultimate reality." 115 S. Ct. at 2520. In other words, the prohibition at issue also raised substantial Free Exercise Clause concerns. As a predictive matter, one wonders if the Court would extend its holding to prohibit the government from refusing to fund pornographic or racist speech. But see SUNSTEIN, THE PARTIAL CONSTITUTION, *supra* note 157, at 312-13 (suggesting that a broad ban on funding profanity or sexually explicit speech should be unconstitutional).

they do not displace market mechanisms.<sup>296</sup> Moreover, if one accepts that a sphere of "political" speech cannot be identified and isolated from other speech, *any* preferentialism in funding is problematic. But once discrimination is viewed as broadly as it should be,<sup>297</sup> it seems inevitable that public funding decisions will be discriminatory in the sense that all, or almost all, government-funded speech is likely to express a view of culture and society that is moderate and majoritarian. It is simply unrealistic to expect otherwise, and constitutional theory should accept that reality.<sup>298</sup> In addition, it is not clear that sound democratic theory requires the majority to subsidize speech that expresses a view of society or culture that the majority finds abhorrent.<sup>299</sup> Finally, since under my constitutional approach selective funding is perhaps the *only* way for the electoral majority to express support for a particular viewpoint or a particular vision of society, it seems all the more important to keep such a safety valve open.

One concern that discriminatory funding decisions raise is the "drowning out" problem. Given the enormous size and financial clout of the government in modern society, it is possible that permitting the government to take sides in cultural and political debates will permit it to control the debate by drowning out other perspectives and speakers through the sheer volume of its speech. This is not a trivial argument, and if such an eventuality were to occur, one could argue that the government had stepped over the line from simply participating to interfering with the market. It is doubtful, however, that this would happen in regard to most topics. Given the enormous volume of speech produced and sold in this country, and the apparently insatiable market demand for such speech, especially video programming, it seems beyond the capacity of even the government to control debate purely through its purchasing power.

For these reasons, selective government funding should not be invalidated. Tolerance of such preferentialism, however, has some

296. This is a distinction with which Professor Sunstein sharply disagrees. See SUNSTEIN, *supra* note 89, at 117.

297. See *supra*, part II.A.1.

298. As discussed above, the activities of the Corporation for Public Broadcasting seem to be a case study in this phenomenon.

299. Of course, any funding involves some such coercion since some taxpayer, probably one with atypical views, is likely to disagree with the message of the speech funded, but since there is no Establishment Clause for speech, I doubt if this has constitutional implications. Cf. *Rosenberger*, 115 S. Ct. at 2520-25 (upholding state funding of a religious publication against an Establishment Clause challenge).



clear implications for First Amendment policy. Since discriminatory funding can only increase the ability of the government, and generally of the majority, to instill its view of the good society as part of the general cultural understanding, it is especially important to create structures that will permit some dissent to be heard, and it is equally important that courts remain vigilant to ensure that the State does not squelch those views.

*C. Extrapolations: Other Mass Media*

In the discussion above, I have dealt primarily with regulation of the cable industry to illustrate how my proposed constitutional analysis would work. There are at least two reasons for this focus. First, because my consideration of these issues was sparked by the *Turner* decision, cable seemed the logical place to focus; but second, the regulation of cable and video is currently the central source of First Amendment mass media issues, and it seems apparent that the importance of cable and wireline video can only increase in the future. Cable is already the primary source of video programming for Americans, and over time it is likely to become even more so as interactive video services are developed by the industry, or by competitors such as telcos. Nonetheless, a short discussion of how these ideas might play out in other mass media contexts is necessary.

I begin with the original mass media, newspapers. Here, my theory generally supports the Court's strongly *laissez-faire* approach to regulation.<sup>300</sup> First, of course, content and speaker preferences of any sort should be immediately suspect. More fundamentally, because concentration within the newspaper industry is a consequence of economies of scale only—because there are few physical restrictions on competition—government regulations aimed at curing market imperfections are likely to be burdensome, ineffectual, and, therefore probably unconstitutional. Newspapers are simply not a market that seems susceptible to effective structural regulation. In addition, because of the close association that exists between newspaper editors and the contents of what they publish, even imposing carriage

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300. See Krattenmaker & Powe, *supra* note 195, at 1721-24, for a description of the Court's strong resistance to regulation of the print media, and the contrast between that approach and the Court's approach to the broadcast media. See also Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 9-18 (1995) (discussing the resistance to regulation of print media).

requirements on newspapers<sup>301</sup> is extremely burdensome. This burden is sufficiently great that, in my view, courts should almost always strike down such requirements. Finally, a *laissez-faire* policy towards newspapers does not seem particularly troublesome because reasonably close substitutes are far more easily found for publication in daily circulation newspapers—for example, publication in weekly news magazines, or for that matter, private pamphleteering—than for video.<sup>302</sup>

Broadcasting, on the other hand, raises issues more similar to cable than to the print media. Given limitations on the available electromagnetic spectrum, physical scarcity is obviously a serious issue for broadcast, and some governmental regulation seems essential even if that regulation consists simply of enforcing ownership rights to the spectrum. My basic objections to regulatory preferences for particular types of speech—and for that matter any censorial power by the government—stand, especially given the central position occupied by television in our culture. What this suggests is that most of the FCC's current regulation of broadcasting is unconstitutional. This includes, in particular, its review of the content of programming in the course of granting or renewing broadcast licenses,<sup>303</sup> its restrictions on indecency in broadcasting,<sup>304</sup> and the Fairness Doctrine.<sup>305</sup> On the other hand, carriage requirements, such as an obligation to sell time slots, or even true common carrier regulation, would probably be

301. One example of such a requirement would be the right-of-reply statute struck down in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244-45 (1974). Right-of-reply provisions are, of course, especially questionable because they are triggered by speech with a particular content.

302. *But cf.* SUNSTEIN, *supra* note 89, at 107-13 (arguing that newspapers should be treated similarly to broadcasters, because of the fact that daily circulation newspapers tend to be monopolies). What I think Professor Sunstein ignores is that publication in the *New York Times* is valuable at least as much due to the imprimatur added by publication in the *New York Times* as it is due to the audience reached by its circulation.

303. This review occurs pursuant to the "public interest" standard of 47 U.S.C. § 309(a). *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (1969); *National Broadcasting Corp. v. United States*, 319 U.S. 190, 216 (1943).

304. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Action for Children's Television v. FCC*, 58 F.3d 654, 654 (D.C. Cir. 1995) (Act III) (*en banc*). For the same reasons as those stated in note 240, *supra*, however, a selective blocking system for indecent programming seems unproblematic.

305. *See supra* note 199. The Fairness Doctrine would be unconstitutional because by requiring coverage of public issues, it would place explicitly political speech—in the narrow sense of speech regarding the political process—in a preferred position. *See* SUNSTEIN, *supra* note 89, at 48, 54-55. The FCC has purported to extend elements of the Fairness Doctrine to cable television, though enforcement appears to be very limited. *See* 47 C.F.R. § 76.205 (1994).

permissible, for essentially the same reasons that common carrier and leased access regulations are permissible in the cable context.<sup>306</sup> Within these guidelines, the government should probably have quite a bit of discretion as to the mechanism it chooses to allocate airwave space; but that mechanism would likely be quite different from the one in use today. I would conclude by noting that the above discussion, at least as applied to television, may be largely moot if the current trend towards the displacement of broadcast television by cable continues, especially because cable does not have nearly as limited a capacity as the airwaves.

Finally, I come to the future: the Internet, and the eventual broadband<sup>307</sup> information superhighway, or infobahn.<sup>308</sup> To begin with, it is not clear that these media even fall within the scope of my analysis, since they may be better characterized as systems for private communications, more analogous to the telephone system than to mass media, where a single speaker reaches a mass audience. The reality is, however, that these media share characteristics of both. First and foremost, any flat regulation of content—that is, of particular types of speech—on these media is of course entirely impermissible.<sup>309</sup> Indeed, it seems even more important to ensure neutrality in the regulation of these communications media than with the current mass media. This is because private, or semi-private, communications on these media are likely to play an even more important role than the mass media in challenging, or alternatively in enconcing, mainstream cultural values.<sup>310</sup>

On the other hand, carriage and access requirements, including especially some variation on common carrier regulation of privately-

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306. See *supra* notes 266-75 and accompanying text.

307. By "broadband," I mean having a transmission system, likely made up of fiber optic cables, that has a very high capacity and is video-capable. See Volokh, *supra* note 271, at 1806 n.3; *The Message in the Medium*, *supra* note 20, at 1067.

308. For the origins of the term "infobahn," see Volokh, *supra* note 253, at 1806 n.4.

309. See *supra* notes 237-40 and accompanying text.

310. See *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 129-31 (1989) (holding that a total ban on indecent phone messages provided by private dial-in telephone services violates the First Amendment, because the total denial of adult access far exceeds that which is necessary to prevent access by minors). Here, the analogy to telephone is probably a good one, since the telephone system, like the infobahn, permits large amounts of private, interactive, person-to-person communications. The difference is that the Internet also permits, and the infobahn will presumably permit, person-to-large audience communications. See Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1622-26, 1629-32 (1995).

owned backbone networks, may be permissible, and even desirable.<sup>311</sup> The important open question is whether the network is likely to evolve towards a monopolistic or oligopolistic structure, in which one or a few persons control the important arteries. If this occurred, access requirements would seem highly desirable to prevent the entity controlling the network from discriminating against speech it disfavors. If, however, a number of competing communications networks come into being, as seems to be happening with the Internet, common carrier regulation would seem unnecessary, unduly burdensome, and therefore presumptively unconstitutional. These questions can only be answered over time. With respect to other regulatory approaches, however, answers can be suggested. In particular, broad restrictions on vertical integration<sup>312</sup> would almost certainly be unconstitutional. In a world in which the broadband network has become the primary means of communication, absent a showing of enormous need and the lack of any regulatory alternatives, such a prohibition would simply be too burdensome on the speech rights of the regulated class to be sustained.<sup>313</sup> Access regulation, in an otherwise *laissez-faire* system, may therefore represent the constitutional limit on regulation.

In this regard, one could argue that government ownership of a backbone broadband network is the best way to ensure free access to a diversity of users, given the constitutional bars to regulating private owners.<sup>314</sup> Certainly, construction of a network by the government may well be desirable, though perhaps financially implausible. Given the danger of misuse of editorial power by network managers, however, one should view government restrictions upon the construction of competing broadband networks with suspicion, and any attempt to establish a legal monopoly over the transmission network,

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311. For an argument in favor of some forms of access rights to the infobahn, see Berman & Weitzner, *supra* note 310, at 1624-26; Henry H. Perritt, Jr., *Access to the National Information Infrastructure*, 30 WAKE FOREST L. REV. 51 (1995). For an argument opposing common carrier regulation, see Krattenmaker & Powe, *supra* note 195, at 1737-39.

312. By this I mean a ban on the use of the network by the owners of network facilities.

313. For an argument in favor of such restrictions, but recognizing the burden that they would impose, see *The Message in the Medium*, *supra* note 20, at 1096-97.

314. For a discussion of the importance of diversity, see *supra* notes 164-71 and accompanying text.

especially a government-owned monopoly, should be presumptively unconstitutional.<sup>315</sup>

In fact, if a widely used and interactive broadband network does come into being in this country, many of the constitutional and regulatory problems outlined in this article may become moot. There is reason to hope that such a medium would permit easy, low-cost access for multiple programmers, who would be able to produce a broad diversity of programming and distribute it at quite low cost to a widespread, voluntary viewership.<sup>316</sup> Were this scenario to come about, it could substantially reduce the current stranglehold held by the mass media over information dissemination, especially in electoral politics. Indeed, there is some evidence that the current Internet, even though only narrow band, is beginning to play such a role.<sup>317</sup> If these trends continue and spread to video, there may be hope yet for a truly free market in ideas and values.

### CONCLUSION

In pursuing the chimera of a universally applicable First Amendment analysis, the Supreme Court has created a doctrine that is in theoretical disarray. In the context of modern mass media regulation in particular, the Court's current two-tier doctrine simply does not work, nor does it advance any plausible First Amendment policies, because the doctrine is premised on an underlying model of unitary and atomistic speech markets that, in the mass media context, does not hold. A rethinking is therefore clearly in order.

This Article seeks to provide such a rethinking. Starting with the example of cable television regulation, it demonstrates the failure of traditional analysis, and then presents an alternative. This alternative is based upon two key premises. The first is an instrumental approach to the First Amendment. The second is a very broad view of the political components of culture, and a concomitant skepticism

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315. However, the government may be able to justify some limitations on construction because of possible disruptions to the use of streets and other government-owned property during the construction process. Any such restrictions, involving as they would the government's management of its own property rather than general mass media regulation, raise difficult, and inevitably *ad hoc*, balancing issues. See *supra* part I.B.2.

316. For a short discussion of how this might happen, see Olcott, *supra* note 29, at 1569-71.

317. For example, there are press reports that the Internet was used widely, and successfully, by the opponents of former Speaker of the House Thomas Foley in defeating his 1994 bid for reelection to the Congress. See Thomas Farragher, *Politicians View High-tech Highway as Modern Road to Votes*, PHILA. INQUIRER, Nov. 3, 1994, at A13.

regarding constitutional theories that favor explicitly political speech. Given these premises, it follows that, at least in the mass media context, governmental or majoritarian manipulation of cultural formation should be the primary evil against which First Amendment policy is directed. Finally, this Article demonstrates that a general preference for market mechanisms and structural methods of regulating speech are the most effective ways to guard against this danger.

Some doctrinal implications follow from these considerations. A revised doctrine, in turn, suggests some precise constitutional limits on the regulation of the cable, print, and broadcast media. The new, interactive media, such as the current Internet and the wideband Information Superhighway to come, present perhaps the most intriguing issues, because of their position in-between the traditional mass media and a system of private communications. While some regulation of transmission facilities may become necessary, in the long run there is hope that such technologies may create truly open and accessible marketplaces in ideas, and obviate the need for ongoing government intervention.

